



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

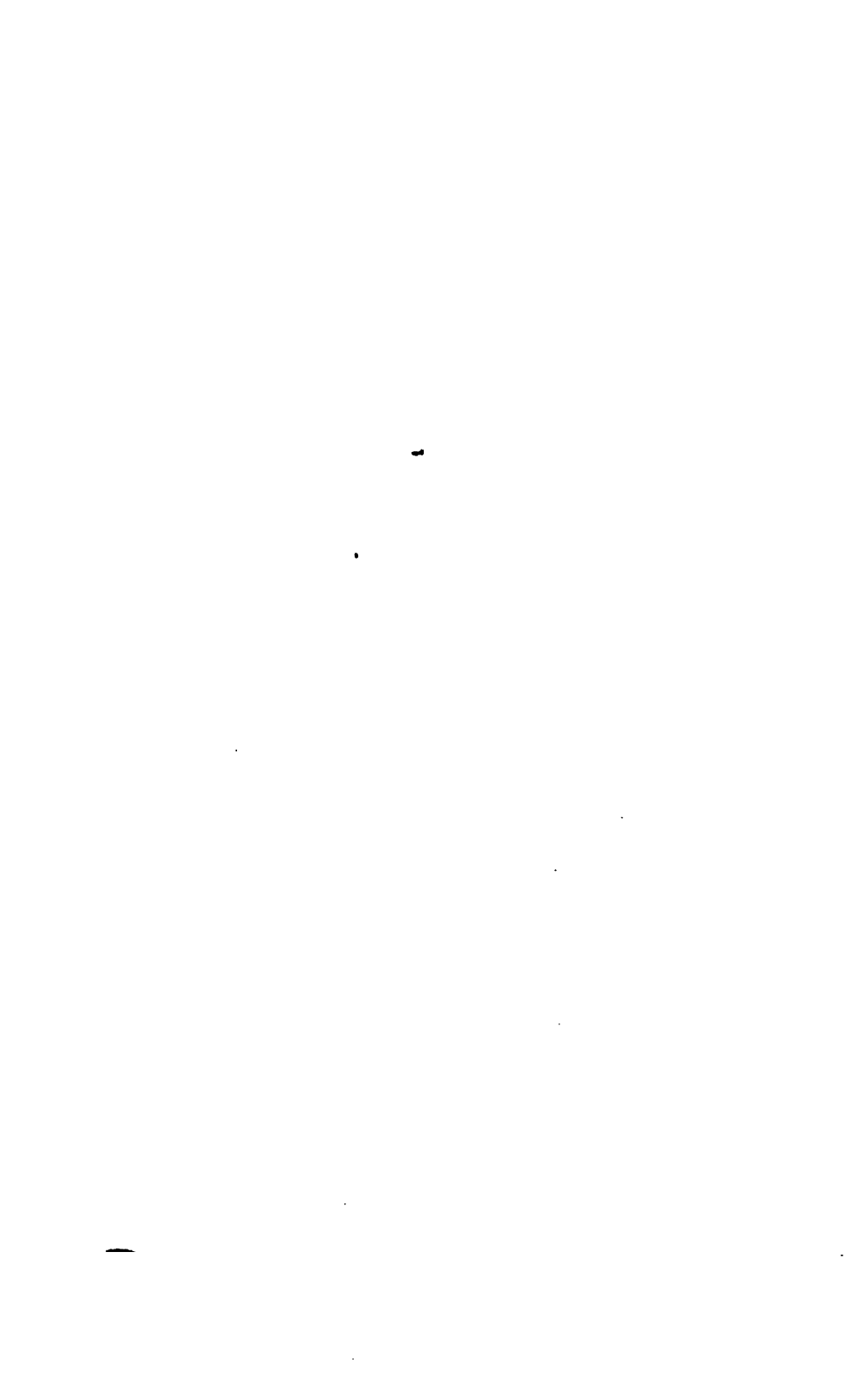
Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

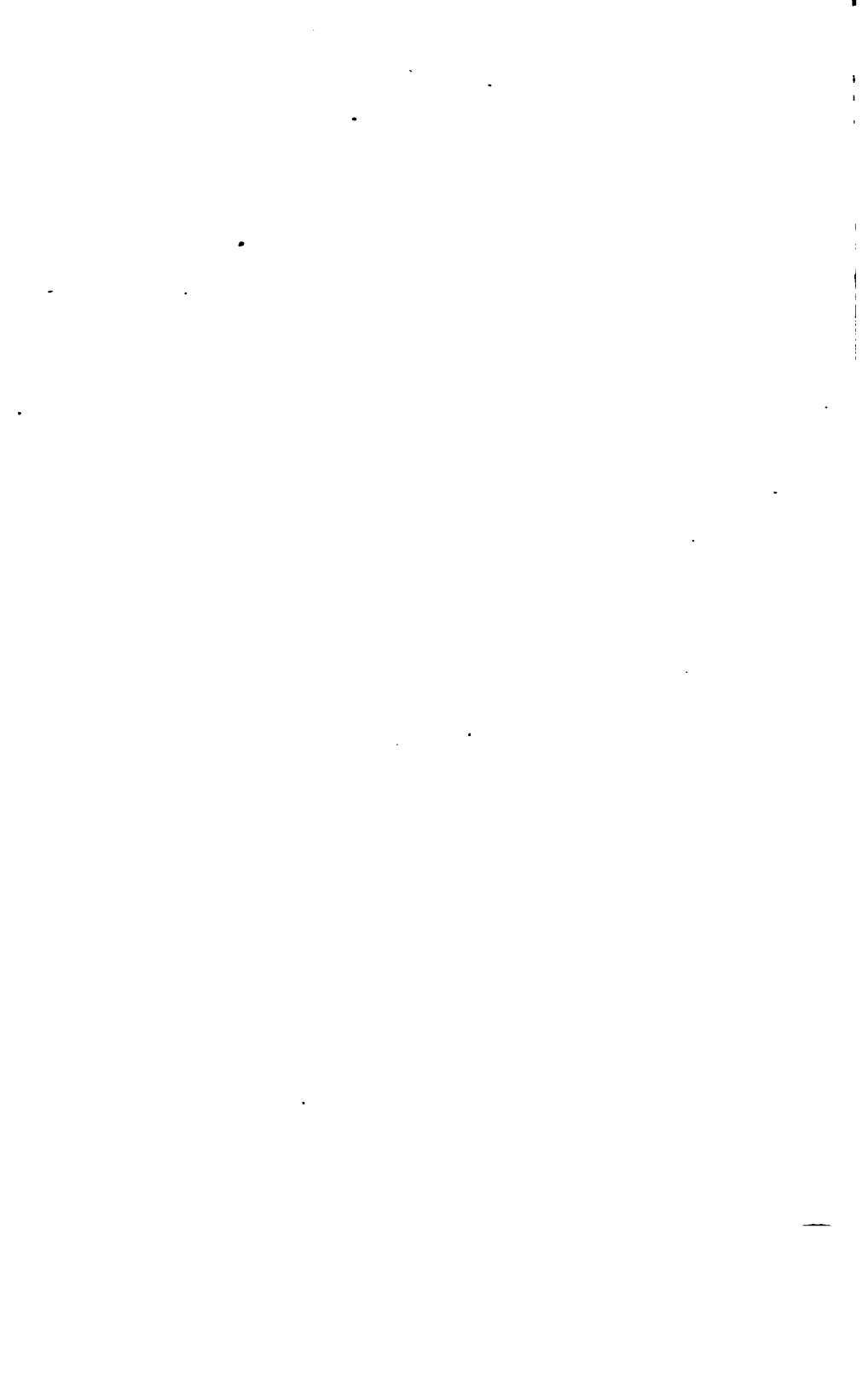


HARVARD LAW LIBRARY

— —

Received MAY 26 1921











REPORTS
OF
CASES DECIDED
IN THE
APPELLATE COURT
OF THE
STATE OF INDIANA

**WITH TABLES OF CASES REPORTED AND CITED, TEXT-
BOOKS CITED, STATUTES CITED AND CONSTRUED, AN
INDEX, AND NOTES TO THE REPORTED CASES**

WILL H. ADAMS,
OFFICIAL REPORTER

WILBUR G. CARPENTER,
CONNOR D. ROSS,
LUCY H. WILHELM,
ASSISTANTS.

VOL. 68

FORT WAYNE PRINTING COMPANY
CONTRACTORS FOR INDIANA STATE PRINTING AND BINDING
FORT WAYNE, INDIANA
1921

Copyright nineteen hundred twenty-one
BY THE STATE OF INDIANA
In the office of the Librarian of Congress at Washington, D. C.

MAY 26 1921

CASES REPORTED

A

Auer, Buckel v.....320

B

Bachman v. Waterman.....580

Baltimore, etc., R. Co. v. Peck.269

Barley v. Sansberry.....132

Barnes, Chicago, etc., R. Co.

v.354

Beckman Supply Co. v. New-

ell679

Blankenbaker, Gray v.....558

Board, etc., Chastain v.....162

— v. Riggs.....263

Bollenbacher v. Foley.....632

Boyd v. Miller.....454

Brayton v. City of Rushville.238

Bright Nat. Bank v. Hanson. 61

Brown, Union School Tp., etc.

v.319

Brumbaugh v. Mellinger....410

Buckel v. Auer.....320

Buckingham v. Kerr, Treas..290

Burkhart, Koons v.....30

Butler, Vandalla Coal Co. v..245

C

Cain, Oolitic Stone Mills Co.

v.646

Calvert, Indian Creek Coal,

etc., Co. v.....474

Cannel City Oil Co., Roper v..637

Capp, Taylor v.....598

Carey, Perry v.....56

Chamberlin v. Myers.....342

Charleston School Tp. v. Is-

grigg709

Chastain v. Board, etc.....162

Chicago, etc., R. Co. v. Barnes.354

—, Curtis, Rec., v.....370

— v. Keefer.....18

— v. Van Stone.....47

Citizens Nat. Bank, Commer-

cial, etc., Bank Co. v.....417

City of Huntingburg v. Fisher.665

City of Indianapolis, Gibson

v.89

City of Rushville, Brayton v..238

Cleveland, etc., R. Co. v. Sam-

mons657

Cloud, Teepe v.....165

Cohn, Wright, Rec., v.....589

Commercial, etc., Bank Co. v.

Citizens Nat. Bank.....417

Curtis, Rec., v. Chicago, etc.,

R. Co.370

D

Davis, Showers Bros. Co. v..227

Davy, Story, etc., Piano Co. v.150

DePew, Noble County Bank v.408

Diffenbaugh, Admr., Pruden-

tial Ins. Co. v.....699

Douglass v. Rights.....111

Drake, Heber v.....448

E

Enterprise Fence, etc., Co. v.

Majors575

F

Federal Life Ins. Co. v. Wee-

don, Admr.529

Federal Union Surety Co. v.

State, ex rel.....337

Ferguson, Weaver v.....169

Fetrow, Indiana State Board,

etc. v.189

Fisher, City of Huntingburg

v.665

Foley, Bollenbacher v.....632

Fort Wayne, etc., Traction

Co., Vandalla R. Co. v....120

G

Gibson v. City of Indianapo-

lis89

Glasser v. Jones.....192

Grand Trunk, etc., R. Co. v.

Thrift Trust Co.....198

Gray v. Blankenbaker.....558

Greenwald, Public Savings Ins.

Co. v.609

Guller, Gdn., Mutual Life Ins.

Co. v.544

H

Hammerton v. J. R. Watkins

Medical Co.515

Hanson, Bright Nat. Bank v.. 61

Heber v. Drake.....	448
H. K. Toy, etc., Co. v. Richards	653
Holtz, Vandalla Coal Co. v....	670
Hostettler, Van Spanje v....	518
Hufford, J. I. Case Threshing Mach. Co. v.....	606

I

Indiana State Board, etc. v. Fetrow	189
Indian Creek Coal, etc., Co. v. Calvert	474
Isgrigg, Charleston School Tp. v.	709

J

James v. Wilson.....	12
J. I. Case Threshing Mach. Co. v. Hufford.....	606
John A. Schumaker Co. v. Kendrew	466
Jones, Glasser v.....	192
J. R. Watkins Medical Co., Hammerton v.	515
J. S. Rogers Co., Mobley v....	308

K

Keefer, Chicago, etc., R. Co. v.	16
Kendall, Vandalla R. Co. v..	1
Kendrew, John A. Schumaker Co. v.	466
Kerr, Treas., Buckingham v..	290
Kokomo Steel, etc., Co., Rusk v.	627
Koons v. Burkhardt.....	30

L

Lake Land Co. v. State, ex rel.	439
Lesh v. Rockcreek, etc., Ins. Co.	301
Linton Trust Co., Smith v..	691
Loi, Admr., Zoellers v.....	395
Lysher, Newcastle Foundry Co. v.	509

M

McClain, Moore v.....	102
Majors, Enterprise Fence, etc., Co. v.	575
Mellinger, Brumbaugh v....	410
Miller, Boyd v.....	454

Mobley v. J. S. Rogers Co...	308
Moore v. McClain.....	102
Moore, etc., Lumber Co. v. Scheid	694
Mowes v. Robbins.....	82
Mutual Life Ins. Co. v. Guller, Gdn.	544
Myers, Chamberlin v.....	342

N

National Council, etc. v. Sims	43
Nelson v. Reidelbach, Exr...	19
Newcastle Foundry Co. v. Lysher	509
Newell, Beckman Supply Co. v.	679
Noble County Bank v. DePew.	406

O

Oolitic Stone Mills Co. v. Cain	646
---------------------------------------	-----

P

Peck, Baltimore, etc., R. Co. v.	269
Pedlow v. Swartz Electric Co.	400
Perry v. Carey.....	56
Pittsburgh, etc., R. Co., Williams v.	93
Prudential Ins. Co. v. Diffebaugh, Admr.	699
Public Savings Ins. Co. v. Greenwald	609
Puritan Bed Spring Co. v. Wolfe	330

R

Ramsey v. Yount.....	378
Raynes v. Staats-Raynes Co..	37
Reidelbach, Exr., Nelson v..	19
Richards, H. K. Toy, etc., Co. v.	653
Riggs, Board, etc. v.....	263
Rights, Douglass v.....	111
Rinelli v. Rubino.....	314
Robbins, Mowes v.....	82
Rockcreek, etc., Ins. Co., Lesh v.	301
Roper v. Cannel City Oil Co..	637
Rose, Vonnegut Hardware Co. v.	385
Rubino, Rinelli v.....	314
Runyan v. Runyan.....	79
Rush v. Kokomo Steel, etc., Co.	627

CASES REPORTED.

V

S

Sammons, Cleveland, 'etc., R.	
Co. v.	657
Sansberry, Barley v.	132
Scheid, Moore, etc., Lumber	
Co. v.	694
Showers Bros. Co. v. Davis..	227
Sims, National Council, etc. v.	43
Smith v. Linton Trust Co.	691
Staats-Raynes Co., Raynes v..	37
State, ex rel., Federal Union	
Surety Co. v.	337
—, Lake Land Co. v.	439
Story, etc., Piano Co. v. Davy.	150
Stout v. Stout, Admr.	278
Swartz Electric Co., Pedlow	
v.	400

T

Taylor v. Capp.	593
Teepe v. Cloud.	165
Thrift Trust Co., Grand Trunk,	
etc., R. Co. v.	198
Town of Bloomfield v. West..	568

U

Union School Tp., etc. v.	
Brown	319

V

Vandalia Coal Co. v. Butler..	245
— v. Holtz.	670
Vandalia R. Co. v. Fort Wayne,	
etc., Traction Co.	120
— v. Kendall.	1
Van Spanje v. Hostettler.	513
Van Stone, Chicago, etc., R.	
Co. v.	47
Vonnegut Hardware Co. v.	
Rose	385

W

Waterman, Bachman v.	580
Weaver v. Ferguson.	169
Weedon, Admr., Federal Life	
Ins. Co. v.	529
West, Town of Bloomfield v..	568
Williams v. Pittsburgh, etc.,	
R. Co.	93
Wilson, James v.	12
Wolfe, Puritan Bed Spring Co.	
v.	330
Wright, Rec., v. Cohn.	589

Y

Yount, Ramsey v.	378
-----------------------	-----

Z

Zoellers v. Lol, Admr.	395
-----------------------------	-----

CASES CITED

Abbott v. Sanders, 80 Vt. 179.399	Baldwin v. Threlkeld, 8 Ind. App. 312644
Abelman v. Haehnel, 57 Ind. App. 15414	Baltimore, etc., R. Co. v. Cincinnati, etc., R. Co., 52 Ind. App. 639130
Able v. Chandler, 12 Tex. 88.. 73	— v. Hickman, 40 Ind. App. 315363, 364, 365, 367
Abshire v. Williams, 76 Ind. 97258	— v. Peck, 53 Ind. App. 281.271
Adam, etc., Co. v. Stewart, 157 Ind. 678415	— v. Young, 146 Ind. 374..369
Adams v. Acme White Lead, etc., Works, 182 Mich. 157..482	Balz v. Benninghof, 5 Ind. App. 522686
— v. Betz, 167 Ind. 161....463	Bank, etc. v. McDowell County Bank, 66 W. Va. 545.....
Adams Express Co. v. Carnahan, 29 Ind. App. 606.....617424, 426, 431, 434
Adolph Kempner Co. v. Citizens Bank, etc., 64 Ind. App. 632571	Barber Asphalt Pav. Co. v. Edgerton, 125 Ind. 455.....294
Albaugh Bros., etc., Co. v. Lynas, 47 Ind. App. 80....241	Barclay v. Commonwealth, 25 Pa. St. 508.....574
Alexander v. Blackburn, 178 Ind. 66278	Barnard v. First Nat. Bank, 61 Ind. App. 634.....415
— v. Spaulding, 160 Ind. 176108	Barnes v. Waugh, 41 N. S. 38318
Allen v. Tuscarora Val. Ry. Co., 229 Pa. 97.....211	Barnett v. Gluting, 3 Ind. App. 415640
American Car, etc., Co. v. Wyatt, 58 Ind. App. 161....236	Barnum v. Rallihan, 63 Ind. App. 349267
American, etc., Tin Plate Co. v. Yonan, 59 Ind. App. 700..408	Barrett v. Kansas, etc., Coal Co., 70 Kan. 649..... 59
American Nat. Ins. Co. v. Nuckols, (Tex. Civ. App.) 187 S. W. 497.....392	Baumgartner v. Hasty, 100 Ind. 575573
Amicable Society v. Bolland, 4 Bligh N. S. 194.....553	Bay v. Saulspagh, 74 Ind. 397689
Angevine v. Ward, 66 Ind. 460282	Bayne v. Riverside Storage, etc., Co., 181 Mich. 378....493
Archer v. Ostemeler, 56 Ind. App. 385238	Beaning v. South Bend Electric Co., 45 Ind. App. 267... 11
Asher v. State, ex rel., 88 Ind. 215339, 340, 341	Beard v. Payne, 64 Ind. App. 324524
Atchison, etc., R. Co. v. Hardy, 94 Fed. 294.....365	Beardslee v. Dolge, 143 N. Y. 160298
Atwood v. Wright, 29 Ala. 346 74	Beaudry v. Watkins, 191 Mich. 445586
Aulger v. Badgley, 29 Ill. App. 336157	Beilling v. City of Evansville, 144 Ind. 644.....573
Ayers v. Huddleston, 30 Ind. App. 242463	Bell v. Bed Rock, etc., Co., 36 Cal. 214 60
Aylesworth v. Brown, 31 Ind. 270254	— v. Hayes, etc., Co., 192 Mich. 80.....336, 493
Baer v. Mobile Cooperage, etc., Co., 159 Ala. 491.....317	— v. Indianapolis, etc., R. Co., 53 Ind. 57..... 52
Baker v. Osborne, 55 Ind. App. 518591	Benton v. Farmers, etc., Ins. Co., 102 Mich. 281.....306
	Berry v. Berry, 147 Ind. 176..686

Bett v. Hughes, 8 B. W. C. C. 382	586	Bright Nat. Bank v. Hartman, 61 Ind. App. 440.....	47, 414
Betts v. New Hartford, 25 Conn. 180	298	Brintons v. Turvey, L. R. A. C. 230	494
Biddle v. Pierce, 13 Ind. App. 239	185	Britton v. Wheeler, 8 Blackf. 31	155
Bierman v. City Mills Co., 151 N. Y. 482.....	317	Broadstreet v. McKamey, 41 Ind. App. 272.....	640
Biggs v. St. Louis, etc., R. Co., 91 Ark. 122.....	157	Bronnenberg v. Indiana Union Traction Co., 59 Ind. App. 495	615
Bimel Spoke, etc., Co. v. Loper, 65 Ind. App. 479.....	511, 512	Brown v. Guyer, 64 Ind. App. 356	197
Bissell Chilled Plow Works v. South Bend Mfg. Co., 64 Ind. App. 1.....	206	— v. Thompson, 45 Ind. App. 188	194
Black v. New Zealand Ship- ping Co., 6 B. W. C. C. 720..	490, 507	Browning v. McCracken, 97 Ind. 279	286
Blaemire v. Barnes, 173 Ind. 657	630	Bruns v. Cope, 182 Ind. 289..	267, 551
Bloomington, etc., R. Co. v. Industrial Board, 276 Ill. 120	394, 405	Bryan v. Uland, 101 Ind. 477.325	
Blose v. Myers, 58 Ind. App. 34	630	Bucyrus Co. v. Townsend, 65 Ind. App. 687.....	512
Blue v. Capital Nat. Bank, 145 Ind. 518	518	Buffkin v. State, 182 Ind. 204.645	
Board, etc. v. Ryan, 183 Ind. 664	709	Burkett v. Bowen, 118 Ind. 279	685
— v. Small, 61 Ind. 318..	180, 181	— v. Holman, 104 Ind. 6...685	
— v. Stout, 136 Ind. 53...297		Burt v. Union Central Life Ins. Co., 187 U. S. 362...553, 555	
Boes v. Grand Rapids, etc., R. Co., 59 Ind. App. 271.....	5	Byrne v. New York, etc., R. Co., 83 N. Y. 620.....	365
Booher v. Goldsborough, 44 Ind. 490	85	Byron v. Central Railroad, 215 Pa. St. 82.....	365
Born & Co. v. Durr, 64 Ind. App. 643.....	469, 470	Bystrom Bros. v. Jacobson, 162 Wis. 180.....	482, 494
Boseker v. Chamberlain, 160 Ind. 114	636	Camp v. Camp, 52 Ind. App. 250	609
Bowen v. Stewart, 128 Ind. 507	453	Campbell v. Indianapolis, etc., R. Co., 110 Ind. 490.....	349
Boyd v. Boyd, 27 Ind. 429...526		— v. Sumner County, 64 Kan. 376	27
— v. Schott, 152 Ind. 161...561		— v. Supreme Conclave, etc., 66 N. J. Law 274.....	555
Bradford v. Wegg, 56 Ind. App. 39	592	Caress v. Foster, 62 Ind. 145.328	
Bray v. Tardy, 182 Ind. 98..	165, 649	Carmel Nat. Gas, etc., Co. v. Small, 150 Ind. 427.....	119
Brazil Block Coal Co. v. Hood- let, 129 Ind. 327.....	9, 11	Carpenter v. Carpenter, Admr., 45 Ind. 142.....	159, 161
Breadheft v. Cleveland, 184 Ind. 130	47	— v. Kansas City, etc., R. Co., 189 Mo. App. 164...210, 212	
Brenner v. Heller, 46 Ind. App. 335	352	Carroll's Case, 225 Mass. 203	469, 471, 678
Brier v. Mankey, 47 Ind. App. 7	77, 85	Carskaddon v. Pine, 154 Ind. 410	636
Brightman's Case, 220 Mass. 17	335	Carter v. Caldwell, 183 Ind. 434	5
		— v. Richart, 65 Ind. App. 255	615

Carthage Turnpike Co. v. Andrews, 102 Ind. 138.....	707
Caspar v. Jamison, 120 Ind. 58	463
Cates v. Bales, 78 Ind. 285..	77, 78
Central R. Co. v. Colasurdo, 192 Fed. 901.....	208, 209
Central Vermont R. Co. v. White, 238 U. S. 507.....	216
Chesapeake, etc., R. Co. v. Jordan, 63 Ind. App. 365..	25, 195, 413
Chicago, etc., Brick Co. v. Sobkowiak, 148 Ill. 573....	9
Chicago, etc., Provision Co. v. Tilton, 87 Ill. 547.....	317
Chicago, etc., R. Co. v. Biddinger, 63 Ind. App. 30..	261, 565
— v. Brown, 66 Ind. App. 126	257
— v. Cobler, 172 Ind. 481..	233
— v. Coon, 48 Ind. App. 675	358, 369
— v. Dinius, 180 Ind. 596..	45, 408
— v. Gorman, 58 Ind. App. 381	260, 369, 370
— v. Gray, 237 U. S. 400..	216, 226
— v. Kennington, 123 Ind. 400	233
— v. Lain, 181 Ind. 386..	564
— v. McGuire, 219 U. S. 549	129
— v. Mitchell, 184 Ind. 588	236, 652
— v. Prohl, 64 Ind. App. 302	257
— v. Richards, 28 Ind. App. 46	561
— v. Sanders, 42 Ind. App. 585	8, 11
— v. Southern Ind. R. Co., 38 Ind. App. 234.....	188
— v. Summers, 113 Ind. 10..	686
— v. Wright, 239 U. S., 548	210, 216, 226
Cincinnati, etc., Railroad v. Wall, 48 Ind. App. 605....	352
Cincinnati, etc., R. Co. v. Eaton, 94 Ind. 474.....	86
— v. Gross, (Ind. App.) 111 N. E. 653.....	8
Citizens' St. R. Co. v. Horton, 18 Ind. App. 335.....	415
City of Crawfordsville v. Barr, 45 Ind. 258	698
City of Decatur v. Eady, 186 Ind. 205	414, 653
City of Evansville v. Miller, 146 Ind. 613.....	573
City of Frankfort v. State, 128 Ind. 438.....	294, 297
City of Indianapolis v. Keeley, 167 Ind. 516.....	51
— v. Schoenig, 48 Ind. App. 76	196
City of Madison v. Korbly, 32 Ind. 74	118
City of Michigan City v. Werner, 186 Ind. 149.....	706
City of Milwaukee v. Althoff, 156 Wis. 68.....	588
City of Pana v. Industrial Board, 279 Ill. 279.....	405
City of Terre Haute v. Burns, 69 Ind. App. —	119
Clark v. Field, 42 Mich. 342..	645
— v. Marlow, 149 Ind. 41..	398
— v. Van Court, 100 Ind. 113	159, 160
Cleveland v. Obenchain, 107 Ind. 591	463
Cleveland, etc., R. Co. v. Beard, 52 Ind. App. 105.....	165, 241
— v. Blind, 182 Ind. 398..	617
— v. Griswold, 51 Ind. App. 497	60
— v. Heath, 22 Ind. App. 47	102
— v. Lynn, 171 Ind. 589..	358
— v. Means, 59 Ind. App. 383	220
— v. Miles, 162 Ind. 646..	363, 367
— v. Quinn, 54 Ind. App. 11	197
— v. Ritchey, 185 Ind. 28..	565
— v. Rudy, 173 Ind. 181..	78, 100
— v. Simpson, 182 Ind. 693..	260
— v. Starks, 58 Ind. App. 341.....	496, 512, 515, 624
— v. True, 53 Ind. App. 156	522
— v. Vincent, 60 Ind. App. 476	18
Cleverley v. Gas, etc., Co., 1 B. W. O. C. 82.....	394
Clover, etc., Co. v. Hughes, L. R. A. C. 242.....	482, 487, 491, 492, 496, 494
Coan v. Grimes, 63 Ind. 21..	562
Cohen v. Reichman, 55 Ind. App. 164	259
Cole v. Gray, 139 Ind. 396..	458
— v. Searfoss, 49 Ind. App. 334	220

Collins v. Dresslar, 133 Ind. 290	35	Davis v. Bayless, 140 Ind. 700	180
— v. Metropolitan Life Ins. Co., 232 Ill. 37.....	555	— v. Bryant, 52 Ind. App. 343	165
Columbia School Supply Co. v. Lewis, 63 Ind. App. 386..	40	— v. Cox, 178 Ind. 486.....	706
Commercial, etc., Bank v. First Nat. Bank, 30 Md. 11..	424, 433	— v. Kendall, 161 Ind. 412..	561
Commercial Nat. Bank v. Arm- strong, 148 U. S. 50.....	428	— v. Mercer Lumber Co., 164 Ind. 413.....	11, 90
Conner v. Citizens' St. R. Co., 146 Ind. 430.....	256	— v. Stonestreet, 4 Ind. 101	110
— v. Woodfill, 126 Ind. 85..	563	— v. Supreme Council, etc., 195 Mass. 402.....	553, 555
Connorsville Wagon Co. v. Mc- Farlan Carriage Co., 166 Ind. 123	101	Dawson v. James, 64 Ind. 162.	35
Consumers' Oil Co. v. Nunne- maker, 142 Ind. 560.....	188	Decker v. Mahon y, 64 Ind. App. 500	195, 567
Continental Ins. Co. v. Bair, 65 Ind. App. 502.....		Dedham Nat. Bank v. Everett Nat. Bank, 177 Mass. 392..	428
.....25, 46, 195, 413		Deeter v. Burk, 59 Ind. App. 449	34
Cook v. St. Paul, etc., R. Co., 34 Minn. 45.....	10	Delaware, etc., Tel. Co. v. Fiske, 49 Ind. App. 348..	92, 197
Cooke v. Holland Furnace Co., 200 Mich. 192.....	471	Detwiler v. Schultheis, 122 Ind. 155	328
Coy v. Indianapolis Gas Co., 146 Ind. 655.....	86	Dill v. Mumford, 19 Ind. App. 609	601
Crabtree v. Missouri, etc., R. Co., 86 Neb. 33.....	365	Domestic Block Coal Co. v. DeArney, 179 Ind. 592....	252, 257, 604
Crayton v. Munger, 9 Tex. 285	74	Donahue v. Sherman's Sons Co., 39 R. I. 373.....	678
Crist v. Jacoby, 10 Ind. App. 688	85	Donlon v. Maley, 60 Ind. App. 25	107
Crocker, etc., Bank v. Nevada Bank, 139 Cal. 564.....	428	Dorn v. Backer, 61 N. Y. 261..	298
Cronin v. Keesling, 50 Ind. App. 260	96, 98	Dorrell v. Herr, 184 Ind. 445..	643
Crooks v. Kennett, 111 Ind. 347	697	Dorsey Machine Co. v. Mc- Caffrey, 139 Ind. 545.....	526
Crow v. Carver, Gdn., 133 Ind. 260	78	Douglass v. State, 18 Ind. App. 289	224
Crowley's Case, 223 Mass. 288	336	Drew v. Town of Geneva, 150 Ind. 662	352
Crumpacker v. Jeffrey, 63 Ind. App. 621	614	Driscoll v. Penrod, 176 Ind. 19	149, 465
Cutts v. Gordon, 13 Me. 474..	155	Dudley v. Northampton St. R. Co., 202 Mass. 443.....	262
Dallas v. Hollingsworth, 3 Ind. 357	162	Duffield v. Peers, 32 D. L. R. 339	588
Damron v. Penn, etc., Ins. Co., 99 Ind. 478.....	556	Duffy v. England, 176 Ind. 575	567
Daniels v. Bruce, 176 Ind. 151	609	— v. Town of Brookline, 226 Mass. 131	471
Danville Trust Co. v. Barnett, 184 Ind. 696.....	564	Dwiggins v. Clark, 94 Ind. 49	602, 603
Davenport v. Gwilliams, 133 Ind. 142	326	Eacock v. State, 169 Ind. 488..	259
		Eastman v. Smith, 56 Ind. App. 621	29
		Eckman v. Funderburg, 183 Ind. 208	258

Edison v. Babka, 111 Mich. 235	27	Federal Life Ins. Co. v. White- head, (Okl.) 174 Pac. 784..	708
Elijah v. Dowling, 49 Ind. App. 515	37	Federal Union Surety Co. v. Indiana, etc., Mfg. Co., 176 Ind. 328	238
Ellison v. Flint, 43 Ind. App. 276	640	Fenton v. J. Thorley & Co., 19 T. L. R. 684.....	495
Elsea v. Adkins, 164 Ind. 580..	35483, 492, 493, 494, 495	
English v. Spokane Com. Co., 57 Fed. 451	318	Ferdinand R. Co. v. Bretz, 59 Ind. App. 123.....	592
Ensley, etc., Co. v. Otwell, 142 Ala. 575	262	Ferguson v. Spencer, 127 Ind. 66	349
Enyeart v. Kepler, 118 Ind. 34	382	Fidelity, etc., Co. v. Jasper Furniture Co., 186 Ind. 506	525
Epsten v. Hancock-Epsten Co., 101 Neb. 442	469	First Nat. Bank v. Bank, etc., 59 Ore. 388	434
Euler v. Euler, 55 Ind. App. 547	207	— v. Bank of Wyndmere, 15 N. D. 299	424
Evansville, etc., R. Co. v. Hoff- man, 67 Ind. App. 571.....	567	— v. Northwestern Nat. Bank, 152 Ill. 296.....	434
— v. Scott, 67 Ind. App. 121	414	— v. Ransford, 55 Ind. App. 663	465
Evansville, etc., Traction Co. v. Evansville Belt R. Co., 44 Ind. App. 155.....	131	— v. Sarilis, 129 Ind. 201..	574
Evansville Ice, etc., Co. v. Winsor, 148 Ind. 682.....	563	First Nat. Bank, etc. v. City Nat. Bank, etc., 182 Mass. 130	428
Eve v. Louis, 91 Ind. 457.....	329	— v. First Nat. Bank, etc., 76 Ind. 561	428
Everett v. Continental Ins. Co., 21 Minn. 76.....	306	— v. Marshalltown State Bank, 107 Iowa 327.....	426
— v. Irwin, 47 Ind. App. 263	194	— v. Ruhl, 122 Ind. 279... 70	
Ewen v. Chicago, etc., R. Co., 38 Wis. 613.....	365	First Nat. Bank of Belmont v. First Nat. Bank of Barnes- ville, 58 Ohio St. 207..	428, 435
Excelsior Clay Works v. De- Camp, 40 Ind. App. 26.....	376	First Nat. Bank. of Craw- fordsville v. First Nat. Bank of Lafayette, 4 Ind. App. 355.....	424, 427, 429, 430
Ex parte Powell, 70 Fla. 363..	445	First Nat. Bank of Danvers v. First Nat. Bank of Salem, 151 Mass. 280.....	428, 435
Fairbanks v. Warrum, 56 Ind. App. 337	42, 527	Fish v. Hetherington, 61 Ind. App. 645	241
Farmers, etc., Bank v. Bank, etc., 115 Tenn. 64.....	428	Fisher v. Carey, 67 Ind. App. 438	352
Farmers Nat. Bank, etc. v. Farmers & Traders Bank, etc., 159 Ky. 141.....	427, 428	Fitch v. American, etc., Ins. Co., 59 N. Y. 557.....	554
Farra v. Braman, 171 Ind. 529	557	Flournoy v. Jeffersonville, 17 Ind. 169	297
Federal Life Ins. Co. v. Ar- nold, 46 Ind. App. 114..	537, 539	Foot v. Stiles, 57 N. Y. 399..	298
— v. Kerr, 173 Ind. 613..	537, 539	Ford & Co. v. People's Bank, etc., 74 S. C. 180.....	427
— v. Lillibridge, 51 Ind. App. 704	537	Fouch v. Wilson, 59 Ind. 93..	614
— v. Petty, 177 Ind. 256..	537, 539	Fowler v. Newsom, 174 Ind. 104	709
— v. Risinger, 46 Ind. App. 146	537	Fry v. Cheltenham Corp., 81 L. J. K. B. N. S. 41.....	678

Fry v. Hare, 166 Ind. 415....381	184 Mich. 449.....492
Fulford v. Northeast Coal, etc., Co., 1 B. W. C. C. 222..486	Grow v. Oregon, etc., R. Co., 44 Utah 160.....208, 209
Furst v. Satterfield, 44 Ind. App. 613462	Guynn v. Wabash, etc., Trust Co., 53 Ind. App. 391..... 37
Galbraith v. McDonald, 123 Minn. 208416	Haas v. Cones Mfg. Co., 25 Ind. App. 469.....258, 644
Garner's Admr. v. Board, 27 Ind. 323162	Hadley v. Prather, 64 Ind. 137 602
Gary, etc., R. Co. v. Hacker, 58 Ind. App. 618..... 42	Haines v. Trueblood, 67 Ind. App. 456352
Gary Land Co. v. Griesel, 179 Ind. 204458	Hamilton v. Barricklow, 96 Ind. 398398
German Fire Ins. Co. v. Zonker, 57 Ind. App. 696..261	Hardy Implement Co. v. Iron Works, 129 Mo. 222..... 27
Germania Bank, etc. v. Bou- tell, 60 Minn. 189..426, 435, 436	Harmon v. Pohle, 46 Ind. App. 369259
Germania Life Ins. Co. v. Lunkenheimer, 127 Ind. 536 708	Harney v. Owen, 4 Blackf. 337162
Gills v. Goodwine, 180 Mass. 140158	Harper v. Behagg, 14 Ind. App. 427686
Gipe v. Pittsburgh, etc., R. Co., 41 Ind. App. 156.....102	Harrison v. Birrell, 58 Ore. 410623
Globe Indemnity Co. v. Indus- trial Acc. Comm., 36 Cal. App. 280586	Harrison Bldg., etc., Co. v. Lackey, 149 Ind. 10.....305
Godfrey v. Ohio, etc., R. Co., 116 Ind. 3052	Harrold v. Whistler, 60 Ind. App. 504165
Goodwin v. Goodwin, 48 Ind. 584282	Harvey v. French, 183 Ind. 665165
Goshen Milling Co. v. Bailey, 186 Ind. 377571	Hasbrouck v. Bouton, 60 Barb. (N. Y.) 413689
Graham v. Graham, 55 Ind. 23325	Hasely v. Ensley, 40 Ind. App. 598243
Grand Legion, etc. v. Beaty, 224 Ill. 346554	Haskell, etc., Car Co. v. Brown, 67 Ind. App. 178.....41, 334, 335, 481, 512
Grand Rapids, etc., R. Co. v. Jaqua, 66 Ind. App. 113... 29	Haskett v. Maxey, 134 Ind. 283325
Grand Trunk, etc., R. Co. v. Reynolds, 175 Ind. 161.... 51	Hatch v. Mutual Life Ins. Co., 120 Mass. 550.....553
— v. Thrift Trust Co., 68 Ind. App. 198.....605	Hayes v. Board, etc., 59 Ind. 552181
Graves v. Jenkins, 58 Ind. App. 500 42	Hays v. Carr, Admr., 83 Ind. 275110
Gray v. Good, 44 Ind. App. 476644	Hayselden v. Staff, 5 Ad. & Ell. 153537
Gregory v. Redd, 53 Ind. App. 629195	Hayward v. Hayward, Admr., 65 Ind. App. 440.....324
Green v. Macy, 36 Ind. App. 560101, 102	Helms v. Appleton, 43 Ind. App. 482194
Greenawaldt v. Lake Shore, etc., R. Co., 165 Ind. 219...358	— v. Bell, 155 Ind. 502...178, 183, 186
Griebel v. State, ex rel., 111 Ind. 369119	Henning v. New Haven, 82 Conn. 661262
Griffin v. State, 119 Ind. 520..187	Hensey v. White, 2 W. C. C. 1485
Grove v. Michigan Paper Co.,	Herbert v. Drew, 32 Ind. 364..574

Hiday v. State, ex rel., 64 Ind. App. 159	119	Huffman v. Huffman, 35 Ind. App. 643	107
Hight v. Carr, 185 Ind. 39...	325	Huffman, Admx., v. Hendry, 9 Ind. App. 324.....	71
Hill v. Braden, 54 Ind. 72....	698	Huffmond v. Bence, Admr., 128 Ind. 131.....	398
— v. Chicago, etc., R. Co., 61 Ind. App. 331.....	165	Hughes v. Atlanta Steel Co., 136 Ga. 511.....	262
— v. Kerstetter, 43 Ind. App. 1	416	Hunt v. Francis, 5 Ind. 302..	463
Hines v. Driver, 100 Ind. 315..	670	— v. Listenberger, 14 Ind. App. 320	618
Hinshaw v. State, 147 Ind. 334	624	Hurley v. Selden, etc., Con- struction Co., 193 Mich. 197	494
Hirth-Krause Co. v. Cohen, 177 Ind. 1	129	Hutchinson v. Truerman, 112 Ind. 21	686
Hitchcock v. Cosper, 164 Ind. 633	327		
Hitz v. Warner, 47 Ind. App. 612	259		
Hoare v. Arding and Hobbs, 5 B. W. C. C. 36.....	678	Illyes v. White River Light, etc., Co., 175 Ind. 118.....	609
Hoey v. Gilroy, 14 N. Y. Supp. 159	447	Indiana Bond Co. v. Jameson, 24 Ind. App. 8.....	541
Hogarty v. Philadelphia, etc., R. Co., 245 Pa. St. 443....	210	Indiana Canning Co. v. Priest, 16 Ind. App. 445.....	602
Hogston v. Bell, 185 Ind. 536..	697	Indiana Central Canal Co. v. State, 53 Ind. 575.....	34
Holbrook v. St. Paul, etc., Ins. Co., 25 Minn. 229.....	306	Indiana, etc., Assn. v. Plank, 152 Ind. 197.....	590
Holder v. Prudential Ins. Co., 77 S. C. 299.....	557	Indiana, etc., Life Ins. Co. v. McGinnis, 180 Ind. 9.....	557
Holland v. Taylor, 111 Ind. 121	557	Indiana, etc., R. Co. v. Adam- son, 114 Ind. 282.....	640
Hollingsworth v. Hollings- worth, 50 Ind. App. 137....	527, 566, 615	— v. Barnhart, 115 Ind. 390	129
Holmes v. Blogg, 8 Taunt. 35	158	— v. Bird, 116 Ind. 217....	185
— v. Hinkle, 63 Ind. 518....	359	Indiana Iron Co. v. Cray, 19 Ind. App. 565.....	314
— v. Missouri, etc., R. Co., 190 Mo. 98.....	365	Indiana Life, etc., Co. v. Reed, 54 Ind. App. 450.....	541
Home Electric Light, etc., Co., v. Collins, 31 Ind. App. 493..	709	Indiana Mfg. Co. v. Coughlin, 65 Ind. App. 268.....	253, 261
Home Ins. Co. v. Howard, 111 Ind. 544	415	Indiana Quarries Co. v. Lav- ender, 64 Ind. App. 415....	195
Hopp v. Luken, 44 Ind. App. 568	15	Indiana Union Traction Co. v. Hiatt, Admr., 65 Ind. App. 233	357
Horn v. Lupton, 182 Ind. 355..	142	— v. Reynolds, 176 Ind. 263	358
Hornbrook-Price Co. v. Stew- art, 66 Ind. App. 400.....	678	— v. Scribner, 47 Ind. App. 621	614, 617
Horton v. Oregon, etc., Naviga- tion Co., 72 Wash. 503....	209	— v. Sullivan, 53 Ind. App. 239	195
Houck v. McCoy, 185 Ind. 713	631	Indianapolis Abattoir Co. v. Bryant, 67 Ind. App. 225..	392
Howard v. Burke, 248 Ill. 224	119	— v. Coleman, 65 Ind. App. 369	333, 515
Howe v. Dibble, 45 Ind. 120...	397	Indianapolis Chair Mfg. Co., v. Wilcox, 59 Ind. 429....	159
Hoyt v. Sprague, 61 Barb. (N. Y.) 497.....	541		
Hudson v. Evans, 81 Ind. 596..	326		
Huffman v. Copeland, 139 Ind. 221	326, 327		

Indianapolis, etc., R. Co. v. Meek, 10 Ind. 502.....	416	Jamieson v. Board, etc., 56 Ind. 466	180, 181
— v. Ragan, 171 Ind. 569..	196	Jann v. Standard Cement Co., 54 Ind. App. 221.....	349
— v. Sample, 58 Ind. App. 461	609	Jarrett v. Cauldwell, 47 Ind. App. 478	77, 415
— v. Sands, 133 Ind. 433...	185	Jendrus v. Detroit Steel Products Co., 178 Mich. 265..	391, 578
— v. Willson, 134 Ind. 95..	367	Jenison v. Graves, 2 Blackf. 440	157
Indianapolis, etc., Traction Co. v. Sherry, 65 Ind. App. 1	414	Jenney Electric Mfg. Co. v. Flannery, 53 Ind. App. 397..	232
Indianapolis, etc., Transit Co. v. Hall, 165 Ind. 557.....	645	J. F. Darmody Co. v. Reed, 60 Ind. App. 662.....	528
— v. Walsh, 45 Ind. App. 42	197	Johansen v. Union Stock Yards Co., 99 Neb. 328.....	678
Indianapolis St. R. Co. v. Schomberg, 164 Ind. 111...	465	Johnson v. Bebout, 59 Ind. App. 159	571
— v. Taylor, 164 Ind. 155..	46	— v. Northwestern, etc., Ins. Co., 56 Minn. 365.....	158
Indianapolis Traction, etc., Co. v. Croly, 54 Ind. App. 566..	363, 365	— v. Samuels, 186 Ind. 56..	414
— v. Gillaspay, 56 Ind. App. 332	195	Jones v. Chesapeake, etc., R. Co., 149 Ky. 566.....	208
Indian Creek Coal, etc., Co. v. Calvert, 68 Ind. App. 474..	624	Joplin v. National, etc., Ins. Assn., 61 Ore. 544.....	306
Ind. Nat. Bank, etc. v. First Nat. Bank, etc., 9 Ind. App. 185	427	Jorgenson v. Grand Rapids, etc., R. Co., 189 Mich. 537..	208, 209
Inland Steel Co. v. Lambert, 66 Ind. App. 246.....	491, 589	Joseph v. Wild, 146 Ind. 248..	349
— v. Smith, 168 Ind. 245..	408	J. Wooley Coal Co. v. Te-vault, 187 Ind. 171.....	651
— v. Yedinak, 172 Ind. 243..	263		
In re Ayers, 66 Ind. App. 458..	335	Kammerling v. Grover, 9 Ind. App. 628	60
In re Betts, 66 Ind. App. 484..	585	Keck v. State, ex rel., 12 Ind. App. 119	689
In re Bowers, 65 Ind. App. 128	333, 335, 481, 515	Keeley v. Bradford, 62 Ind. App. 683	165
In re Harraden, 66 Ind. App. 298	585, 586	Keesling v. Watson, 91 Ind. 578	704
In re Henderson, 64 Ind. App. 581	469, 470	Kelley v. Augsperger, 171 Ind. 155	591
In re McCaskey, 65 Ind. App. 349	470, 471, 495, 678	— v. Bell, 172 Ind. 590....	261
In re Raynes, 66 Ind. App. 321	38	— v. Scanlan, 55 Ind. App. 611	15
In re Stone, 66 Ind. App. 38..	405, 579	Kelso v. Cook, 184 Ind. 173..	47
International Harvester Co. v. Hauelsen, 66 Ind. App. 355..	149	Kemery v. Zeigler, 176 Ind. 660	524
Interstate Iron, etc., Co. v. Szot, 64 Ind. App. 173....	404	Kerr v. Minnesota, etc., Assn., 39 Minn. 174	554
Irey v. Markey, 132 Ind. 546..	328	— v. Ritchies, 50 S. L. R. 434	490, 507
		Kibbey v. Richards, 30 Ind. App. 101	568
Jackson v. Jackson, 149 Ind. 238	525, 526	Kimball v. Boston, etc., R. Co., 55 Vt. 95	537
Jacobs v. Koehler, etc., Co., 208 N. Y. 416.....	363, 367	King v. Batterson, 13 R. I. 117	27
Jamaica, etc., Corp. v. Chandler, 121 Mass. 3.....	61		
James v. Jellison, 94 Ind. 292..	188		

King v. Inland Steel Co., 177 Ind. 201	11	Leonard v. City of Terre Haute, 48 Ind. App. 104....	119
— v. Murphy, 140 Mass. 254.	60	Leslie v. Ebner, 67 Ind. App. 32	167, 168
Kinnaman v. Kinnaman, 71 Ind. 417	562	Lindley v. Dempsey, 45 Ind. 246	602
Kinney v. Insurance Society, 159 Iowa 490.....	306	Lindquist v. Dickson, 98 Minn. 369	640
Kinzer v. Brown, 170 Ind. 81	178, 183, 186	Lindsley v. Patterson, (Mo.) 177 S. W. 826.....	383
Kirby v. Cannon, 9 Ind. 371..	155	Linthicum v. Truitt, 2 Boyce (Del.) 338	367
Kirklin v. Clark, 53 Ind. App. 358	98	Little v. State, 90 Ind. 338....	297
Kirkoff Bros. v. McCool, 64 Ind. App. 645.....	312	Longueville v. Western Assurance Co., 51 Iowa 553.....	306
Kitchell v. Schneider, 180 Ind. 589	699	Lortz v. Davis, 50 Ind. App. 337.....	178, 183, 184, 185, 186
Kitchenham v. S. S. "Johannesburg," 4 B. W. C. C. 311..	508	Louisville, etc., Lighting Co. v. Hynes, 47 Ind. App. 507....	11
Knapp v. State, 168 Ind. 153..	261	Louisville, etc., R. Co. v. Kemp, 140 Ga. 657.....	208, 209
Knight, etc., Ins. Order v. Shoaf, 166 Ind. 367.....	307	— v. Lockbridge, 93 Ind. 191	178
Knoll v. Baker, 34 Ind. App. 124	349	— v. Miller, 141 Ind. 533....	257
— v. City of Salina, 98 Kan. 428	678	— v. Montgomery, 186 Ind. 384	260
Kokomo Brass Works v. Doran, 59 Ind. App. 583....	236	— v. Mottley, 219 U. S. 467..	129
Kreig v. Palmer Nat. Bank, 51 Ind. App. 34.....	688	— v. Wood, 113 Ind. 544....	707
Kuhn v. Powell, 61 Ind. App. 131	563	Louisville, etc., Traction Co. v. Leaf, 40 Ind. App. 214....	457
Kunze v. Detroit, etc., Co., 192 Mich. 435.....	586, 587	— v. Lottich, 59 Ind. App. 426	465
Kurtz v. Phillips, 63 Ind. App. 79	191	Love v. Carpenter, 30 Ind. 284	142
Lake Erie, etc., R. Co. v. Keiser, 25 Ind. App. 417.....	274	— v. Oldham, 22 Ind. 51..	77
Langley v. Mayhew, 107 Ind. 198	385	Lucas v. Rhodes, 48 Ind. App. 211	564
Lanman v. Crooker, 97 Ind. 163	463	McAdams v. Bailey, 169 Ind. 518	325
Lansden v. McCarthy, 45 Mo. 106	28	McCarthy v. Henderson, 138 Mass. 310.....	158, 161
Lathers v. Mutual, etc., Ins. Co., 135 Wis. 431.....	306	McCaslin v. State, ex rel., 44 Ind. 151	442
LaVeck v. Parke-Davis Co., 190 Mich. 604.....	335, 493	McCluer v. Girard, etc., Ins. Co., 43 Iowa 349.....	306
Leach v. Dickerson, 14 Ind. App. 375	644	McClung v. Kelley, 21 Iowa 508	317
— v. State, 177 Ind. 234....	606	McClure v. Anderson, 58 Ind. App. 615	242
— v. Webb, 62 Ind. App. 693	282, 591	McCormick v. Hunter, 50 Ind. 186	326
Leader Pub. Co. v. Grant Trust, etc., Co., 182 Ind. 651.....	142	McCoy v. Kokomo R., etc., Co., 158 Ind. 662.....	699
Lea v. Beck, 30 Ind. 148....	452	McCray v. Whitney, 56 Ind. App. 94	39
— v. Woolsey, 109 Pa. St. 124	10	McCready v. Virginia, 94 U. S. 391	444

McDonald v. Coryell, 134 Ind. 493	670	Michael v. State, 178 Ind. 676. 261	
McIntosh v. St. Louis, etc., R. Co., 182 Mo. App. 288.....		Migatz v. Stieglitz, 166 Ind. 361	709
.....209, 210, 212, 216		Millhollin v. Adams, 66 Ind. App. 376	522
— v. Zaring, 150 Ind. 301..	703	Miller v. Burch, 32 Texas 208	574
McIntyre v. Orner, 166 Ind. 57	220	— v. Burket, 132 Ind. 469..	352
McKinney v. Frankfort, etc., R. Co., 140 Ind. 95.....	180	— v. Dill, 149 Ind. 326....	359
McMullen v. Gavette Con- struction Co., 200 Mich. 203	469, 471	— v. Gates, 62 Ind. App. 37.....	397
McNight v. Kingsley, 48 Ind. App. 372	465	— v. Haney, 64 Ind. App. 406.....	261
Madden v. State, 148 Ind. 183..	457	— v. Ruse, 54 Ind. App. 25.....	241
Madden's Case, 222 Mass. 487	337, 394	— v. State, 149 Ind. 607...	297
Magic Packing Co. v. Stone- Ordean, etc., Co., 158 Ind. 538	688	Miller, Admr., v. Carmichael, 98 Ind. 236.....	286
Magnuson v. Billings, 152 Ind. 177	241	Millikan v. McAlpin, 181 Ind. 482	37
Mak-Saw-Ba Club v. Coffin, 169 Ind. 204.....	15, 282	Mills v. Rebstock, 29 Minn. 380	555
Malott v. Central Trust Co., 168 Ind. 428.....	528	Milwaukee v. Industrial Comm., 160 Wis. 238.....	335
Mann v. Everston, 32 Ind. 355	318	Missouri, etc., R. Co. v. Wulf, 226 U. S. 570.....	211
March v. Metropolitan Life Ins. Co., 186 Pa. St. 629...	708	M'Nelce v. Singer, etc., Ma- chine Co., 4 B. W. C. C. 351	586
Marion Tp. Union Drainage Co. v. Norris, 37 Ind. 424..	689, 690	Modern Woodmen, etc. v. Miles, 178 Ind. 105	549
Martin v. Waddell, 16 Pet. 367	444	Monongahela River, etc., Coke Co. v. Walts, 56 Ind. App. 235.....	90, 527, 566, 615
Mason v. Mason, 160 Ind. 191..	557	Moodadjian's Case, 229 Mass. 521	337
— v. State, 170 Ind. 195...	465	Moore v. Ohl, 65 Ind. App. 691.....	261, 408, 565, 567
Mason's, etc., Ins. Assn. v. Brockman, 20 Ind. App. 206..	556	— v. State, ex rel., 43 Ind. App. 387	341
Matter of Grieb v. Hammerle, 222 N. Y. 382.....	588	Moran v. Dickinson, 204 Mass. 559	262
Matter of New York Catholic Protector, 77 N. Y. 342..	298	Morgan v. Arnt, 63 Ind. App. 590	241
Mayor v. Jaques, 30 Ga. 506..	447	Morris v. State, etc., Assur- ance Co., 183 Pa. St. 563...	554
Maywood Stock Farm v. Pratt, 60 Ind. App. 131.....	88	Morrison v. Carey, 129 Ind. 277	670
Melleite v. Indianapolis, etc., Traction Co., 45 Ind. App. 88	9	Mosier v. Carter, 84 Kan. 361..	325
Meno v. State, 186 Ind. 4....	571	Mumford v. Murray, 6 Johns. Ch. (N. Y.) * 452.....	142
Merchants' Nat. Bank v. Nees, 62 Ind. App. 290.....	645	Mutual Life Ins. Co. v. Fink- elstein, 58 Ind. App. 27....	261
Merica v. Burget, 36 Ind. App. 453	149	— v. Kelly, 114 Fed. 268..	553, 555
Meeker v. Bishop, 56 Ind. App. 455	14	— v. Wiswell, 56 Kan. 765..	550
Metzger v. Franklin Bank, 119 Ind. 359	706	Naglee v. Alexandria, etc., R. Co., 83 Va. 707.....	53

National Fire Ins. Co. v. Strebe, 16 Ind. App. 110.....	704	Palmer v. Beall, 60 Ind. App. 206	56, 631, 649
National Life Ins. Co. v. Head- rick, 63 Ind. App. 54.....		— v. Dosch, 148 Ind. 10..	462, 463
.....617, 624, 643	 v. Oregon, etc., R. Co.,	
Neal v. Coburn, 92 Me. 139....	424	84 Utah 466.....	220
New v. Jackson, 50 Ind. App. 120	261	Papinaw v. Grand Trunk R. Co., 189 Mich. 441.....	588
New England, etc., Wool Co. v. Standard Worsted Co., 185 Mass. 328.....	35	Parish v. Kaspere, 109 Ind. 586	563
Newman v. Horner, 55 Ind. App. 298	39	Parker v. Des Moines Life Assn., 108 Iowa 117.....	554
Noblesville Gas, etc., Co. v. Teter, 1 Ind. App. 322....	359	— v. Hickman, 61 Ind. App. 152	551
Nordyke & Marmon Co. v. Hilborg, 62 Ind. App. 196236, 651, 652		— v. State, 64 Ind. App. 671	450
Norris v. Haggin, 136 U. S. 386	526	Parrish v. Thurston, 87 Ind. 437	529
North v. Jones, 53 Ind. App. 203	463	Parsons v. Durand, 150 Ind. 203	119
North American Union v. Ole- ske, 64 Ind. App. 435.....	550	Patterson v. Natural Pre- mium, etc., Ins. Co., 100 Wis. 118	554
Northern, etc., Cable Co. v. Peoples Mutual Tel. Co., 184 Ind. 267	15	Paulus v. Latta, 93 Ind. 34..	326
Northwestern, etc., Ins. Co. v. Hazelett, 105 Ind. 212.....	551	Paxton-Eckman Chem. Co. v. Mundell, 62 Ind. App. 45..	524
— v. McCue, 223 U. S. 234..553, 555		Peck v. Mallams, 10 N. Y. 509	34
Nowlin v. Whipple, 120 Ind. 596	349	Pederson v. Delaware, etc., R. Co., 229 U. S. 146....	208, 209
Noyes v. Northwestern, etc., Ins. Co., 64 Wis. 415.....	306	Pembina Mining Co. v. Penn- sylvania, 125 U. S. 181....	446
Nysegander v. Lowman, 124 Ind. 584	85	Pennington County Bank v. First State Bank, 110 Minn. 263	424, 428
Ocean Steamship Co. v. Wilder & Co., 107 Ga. 220.....	55	Penn Mut. Life Ins. Co. v. Norcross, 163 Ind. 379....	538
O'Hara v. Hayes, 3 B. W. C. C. 586.....	490, 507	People v. Kirk, 162 Ill. 138..	444
Ohio, etc., R. Co. v. Davis, 23 Ind. 553	52, 55	— v. Park, etc., R. Co., 76 Cal. 156	447
Ohio Farmers Ins. Co. v. Vogel, 166 Ind. 239.....	92	People, ex rel. v. Crawley, 274 Ill. 139	383
Ohio Valley Trust Co. v. Wernke, 179 Ind. 49.....	254, 257, 260	People's Bank v. Franklin Bank, 88 Tenn. 299....	424, 435
Oil-Well Supply Co. v. Wat- son, 168 Ind. 603.....	317	People's Sav., etc., Assn. v. Spears, 115 Ind. 297.....	37
Oleson v. Lake Shore, etc., R. Co., 143 Ind. 405.....	102	Personette v. Cronkhite, 140 Ind. 586	561
O'Neill v. Hudson, 59 Ind. App. 541	591	Peters v. Cooper, 95 Mich. 191	602
O'Neill v. Wilcox, 115 Ia. 15..	567	Peterson v. Gibbs, 147 Cal. 1	693
Paine v. Gunniss, 60 Minn. 257	689	— v. Mississippi, etc., Ins. Co., 24 Iowa 494.....	306
		Pfeiffer v. Crane, Gdn., 89 Ind. 485	282, 285
		Picken v. Miller, 59 Ind. App. 115	664

Pickett v. Quincy, etc., R. Co., 156 Mo. App. 272.....	8
Pierce v. Provident, etc., Supply Co., 4 B. W. O. C. 242.....	596
Pillsbury, etc., Co. v. Walsh, 60 Ind. App. 78.....	
.....522, 600, 601, 602, 605	
Pitcher v. Dove, 99 Ind. 175.....	463
Pittsburgh, etc., R. Co. v. City of Hartford City, 170 Ind. 674	129
— v. Indiana Horseshoe Co., 154 Ind. 322.....	273, 274
— v. James, 64 Ind. App. 456	194
— v. Knox, 177 Ind. 344.....	100
— v. Lighthouse, 168 Ind. 438	261
— v. Muncie, etc., Traction Co., 174 Ind. 167.....	130
— v. Terrell, 177 Ind. 447.....	869
— v. Vance, 58 Ind. App. 1	18
— v. Wood, 45 Ind. App. 1.....	100
Pleasants v. Blodgett, 39 Neb. 741	566
Plummer v. Indianapolis Union R. Co., 56 Ind. App. 615.....	363
Portland, etc., Mach. Co. v. Gibson, 184 Ind. 342.....	254, 708
Potter Mfg. Co. v. A. B. Meyer & Co., 171 Ind. 513.....	698
Pouder v. Tate, 111 Ind. 148.....	685
Premier Motor Mfg. Co. v. Telford, 61 Ind. App. 164.....	253
Pressley v. Lamb, 105 Ind. 171	297
Price v. Furmap, 27 Vt. 268.....	158
— v. Neal, 3 Burr. 1354.....	
.....424, 425, 434, 435	
Public Utilities Co. v. Cosby, 60 Ind. App. 252.....	527, 566, 615
Pumphrey v. State, 84 Neb. 636	645
Puritan Bed Spring Co. v. Wolfe, 68 Ind. App. 330.....	394
Putnam v. Murray, 174 App. Div. 720	586
Pyne v. Wood, 145 Mass. 558.....	158
Radebaugh v. Scanlan, 41 Ind. App. 109	636
Railroad Co. v. Gladmon, 15 Wall. 410	367
Railroad Commission, etc. v. Grand Trunk, etc., R. Co., 179 Ind. 255.....	129
Ramsey v. Blalock, 32 Ga. 376	74
Raper v. American Tin-Plate Co., 156 Ind. 323.....	98
Ray v. Baker, 165 Ind. 74.....	524
Reck v. Hathboro, etc., Ins. Co., 163 Pa. St. 443.....	306
Redhead Bros. v. Wyoming, etc., Investment Co., 126 Iowa 410	603
Reed v. State, 147 Ind. 41.....	260
Reed, Exrx., v. Farmers Bank, etc., 67 Ind. App. 425.....	608
Reeves & Co. v. Miller, 48 Ind. App. 339	618
Refuge Assurance Co. v. Millar, 5 B. W. O. C. 522.....	596
Reichert v. Krass, 13 Ind. App. 348	78, 376
Reid v. Klein, 138 Ind. 484.....	463
Reissner v. Oxley, 80 Ind. 580	149
Republic Iron, etc., Co. v. Berkes, 162 Ind. 517.....	8, 9
Retmier v. Cruse, 67 Ind. App. 192	394
Rhynas v. Keck, 179 Iowa 422	318
Rice v. Boyer, 108 Ind. 472.....	159
— v. Butler, 160 N. Y. 578.....	158
— v. Richardson, 3 Ala. 428	74
Richter v. Meyers, 5 Ind. App. 33	602
Richwine v. Jones, 140 Ind. 289	463
Ricketts v. Harvey, 108 Ind. 564	188
Ridgley v. Mooney, 16 Ind. App. 362	601
Riggs v. Board, etc., 181 Ind. 172	264, 268
Riley v. First Trust Co., Admr., 65 Ind. App. 577.....	26, 561
— v. Kepler, 94 Ind. 306.....	71
Ritter v. Mutual Life Ins. Co., 169 U. S. 139.....	553, 555
Roach v. Cumberland Bank, 60 Ind. App. 547.....	196
Robbins v. Original Gas Engine Co., 191 Mich. 122.....	
.....335, 394, 483, 493	
Roberts v. Northwestern, etc., Ins. Co., 143 Ga. 780.....	557
Robertson v. Van Cleave, 129 Ind. 217	150
Rogers v. Beach, 115 Ind. 413	110
Rohrbaugh v. Leas, Admr., 63 Ind. App. 544	167

Rook v. Straus Bros. Co., 60 Ind. App. 381.....	45, 165, 241
Root v. London Guarantee, etc., Co., 92 App. Div. 578..	392
Roper v. Greenwood, 3 W. C. O. 23	485
Ropp v. Fulton, 183 Ind. 251..	512
Rose v. Chicago, etc., R. Co., 181 Ind. 658.....	39
Rosenmeier v. Mahrenholz, 179 Ind. 467	462
Rossmiller v. State, 114 Wis. 169	444, 445
Roth v. State, ex rel., 158 Ind. 242	118
Rowan v. State, 184 Ind. 390..	705
Rowell v. Klein, 44 Ind. 290..	640
Rudisill v. State, ex rel., 40 Ind. 485	183
Runyon v. Snell, 116 Ind. 164..	640
Rupe v. Hadley, 113 Ind. 416..	326
Ryan v. Rhodes, 167 Ind. 121..	181
— v. Ulmer, 108 Pa. St. 332	318
St. Clair v. Princeton Coal, etc., Co., 50 Ind. App. 269..	465
St. Louis, etc., R. Co. v. Coke, 118 Ark. 49.....	210
San Pedro, etc., R. Co. v. Davide, 210 Fed. 870..	208, 209
Sargent Glass Co. v. Matthews Land Co., 35 Ind. App. 45..	28
Scheible v. Slagle, 89 Ind. 323	35, 463
Schlessinger v. Forest Products Co., 78 N. J. Law 637..	27
Schlosser v. Schlosser, 183 Ind. 659	165
Schmid v. Indiana, etc., Accident Assn. Co., 42 Ind. App. 483	483
Schmidt v. O. K. Baking Co., 90 Conn. 217.....	678
Schmied v. Keeney, 72 Ind. 309	180
Schondel v. State, 174 Ind. 734	261
Schowe v. Bower, 186 Ind. 29	241
Schroetke v. Jackson, etc., Co., 193 Mich. 616.....	494, 507
Scobey v. Walker, 114 Ind. 254	34
Scott v. Dilley, 53 Ind. App. 100	328
— v. Goldinghorst, 123 Ind. 268	698
— v. White, 71 Ill. 287....	157
Seaboard Air Line Railway v. Horton, 233 U. S. 492.....	8
Seller v. Economic Life Assn., 105 Ia. 87.....	554
Seward v. Clark, Admr., 67 Ind. 289	286
Shannon v. Shaw, 201 Mass. 393	10
Shaw v. Proffitt, 57 Ore. 192..	350
Shedd v. American Maize, etc., Co., 60 Ind. App. 146..	352, 465
Shellhouse v. State, 110 Ind. 509	563
Shepard v. Goben, 142 Ind. 318	457
Shields v. State, 149 Ind. 395..	259
Shipley v. Smith, 162 Ind. 526	159, 160
Shipman v. Protected Home Circle, 174 N. Y. 398..	553, 554
Shipp v. Atkinson, 8 Ind. App. 505	602
Shirk v. Neible, 156 Ind. 66..	70
Shook v. State, ex rel., 53 Ind. 403	340
Shortle v. Terre Haute, etc., R. Co., 131 Ind. 338.....	131
Shoults v. McPheeters, 79 Ind. 373	297
Shrock v. Crowl, 83 Ind. 243..	159
Simon v. City of Wabash, 58 Ind. App. 127.....	242
Simpson Construction Co. v. Industrial Board, 275 Ill. 366	394, 405
Skaags v. City of Martinsville, 140 Ind. 476.....	573
Slauter v. Favorite, 107 Ind. 291	339
Sloan v. Blemiller, 34 Ohio St. 492	443
Smith v. City of Madison, 7 Ind. 86	224
— v. Newbaur, 144 Ind. 95..	698
— v. Ponsford, 184 Ind. 53..	563
— v. Solvay Process Co., 100 Kan. 40	471
Smith v. State, 165 Ind. 180..	259
— v. Toth, 61 Ind. App. 42	408
Snodgrass v. Morris, 123 Ind. 425	697
— v. Sweetser, 15 Ind. App. 682	424
Sonneborn v. S. F. Bowser & Co., 64 Ind. App. 429.....	518
Southern Development Co. v. Silva, 125 U. S. 247.....	528

Southern Product Co. v. Frank- lin Coil Hoop Co., 183 Ind. 123615, 641	State, ex rel. v. Milne, 36 Neb. 301.....119
Southern R. Co. v. Adams, 52 Ind. App. 322.....255, 260	— v. Noble, 118 Ind. 350...297
— v. Crone, 51 Ind. App. 300 79	— v. Palmer, 184 Ind. 7...189
— v. Howerton, 182 Ind. 208208, 209, 214, 216	— v. White, 151 Ind. 384...181
Southern Sand, etc., Co. v. State, ex rel., 121 Ark. 1...445	Stearns v. Sims, 24 Okla. 623...119
South Shore Gas, etc., Co. v. Ambre, 44 Ind. App. 435...233	Steele v. McCarty, 130 Ind. 547689, 690
Southwestern Surety Ins. Co. v. Pillsbury, 172 Cal. 768... 482, 483	Steffy v. Town of Monroe City, 135 Ind. 466.....573
Sovereign Camp, etc. v. Lath- am, 59 Ind. App. 290.....46, 257, 609	Stephens v. Hannibal, etc., R. Co., 96 Mo. 207 8
Spork v. International Har- vester Co., 58 Ind. App. 112165	Stewart v. Stewart, 28 Ind. App. 378359
Sprinkle v. Truelove, 22 Ind. App. 577 28	— v. Willsons, etc., Coal Co., 5 F. 120.....486
Springfield, etc., R. Co. v. Welsch, 155 Ill. 511.....367	Stiles v. Hasler, 56 Ind. App. 88 5
Squires v. Summers, 85 Ind. 252 34	Stimson v. Krueger, 63 Ind. App. 567196
S. S. "Swansea Vale" v. Rice, 4 B. W. C. C. 298.....508	Stockwell v. Whitehead, 47 Ind. App. 423.....640
Standard Cement Co. v. Minor, 54 Ind. App. 301.....8, 9, 10	Stone v. Elliott, 182 Ind. 454...181
Standard Steel Car Co. v. Martinez, 66 Ind. App. 672...651	Straus v. Yeager, 48 Ind. App. 448549
Stanley's Estate v. Pence, 160 Ind. 636327	Stucke v. Orleans R. Co., 50 La. Ann. 17210
State v. Cleveland, etc., R. Co., 94 Ohio St. 61.....444, 446	Sugar Valley Coal Co. v. Drake, 66 Ind. App. 152.....336
— v. Johnson, Admr., 52 Ind. 197443	Suloj v. Retlaw Mines Co., 57 Ind. App. 302196
— v. Kean, 69 N. H. 122...447	Supreme Conclave, etc. v. Miles, 92 Md. 613.....554
— v. Ohio Oil Co., 150 Ind. 21442	Supreme Council, etc. v. Pels, 110 Ill. App. 409.....554
— v. Rodman, 58 Minn. 393...444	Supreme Lodge, etc. v. Gelbke, 198 Ill. 365.....550
— v. Wabash R. Co., 115 Ind. 466 52	— v. Kutscher, 72 Ill. App. 462.....554
State Bank v. Cumberland Savings, etc., Co., 168 N. C. 605424	Switow v. Dustman, 183 Ind. 625608
State, ex rel. v. Board, etc., 45 Ind. 501.....297	S. W. Little Coal Co. v. O'Brien, 63 Ind. App. 504.....253, 651
— v. Curtis, 180 Ind. 191...118	Symmes v. Brown, 13 Ind. 318 36
— v. Denny, 118 Ind. 382...297	
— v. Hyde, 121 Ind. 20...297	Tarver v. Deppen, 132 Ga. 798 59
— v. Insurance Co., 115 Ind. 257442	Tate v. Foshee, 117 Ind. 322...463
— v. Joyce, 48 Ind. 310...330	Taylor v. Burk, Exr., 91 Ind. 252236
— v. Long, 168 Ind. 553...591	— v. City of Fort Wayne, 47 Ind. 274668
— v. Mayne, 68 Ind. 285...118	Terre Haute, etc., R. Co. v. Zehner, 166 Ind. 149.....267
	Terre Haute St. R. Co. v. Tappenbeck, 9 Ind. App. 422 363, 367

Terry v. Davenport, 170 Ind. 74574	United States Cement Co. v. Whitted, 46 Ind. App. 105...276
Tewksbury v. Howard, 138 Ind. 103 34	United States, etc., Assn. v. Barry, 131 U. S. 100.....493
Thiebaud v. Dufour, 57 Ind. 598.....282, 284, 285	United States, etc., Ins. Co. v. Batt, 49 Ind. App. 277...561
Thieme, etc., Brewing Co. v. Kessler, 47 Ind. App. 284...196	United States Express Co. v. Rawson, 106 Ind. 215....614
Thomas v. Thomas, 61 Ind. App. 101191	United States Fidelity, etc., Co., v. Poetker, 180 Ind. 255254
Thompson v. Beatty, 171 Ind. 579527, 566, 615	
— v. Peck, 115 Ind. 512...415	
— v. Thompson, 156 Ind. 276196	Vagliano Bros. v. Bank of England, L. R. 23 Q. B. Div. 243433
Tibbs v. Watts et al. Co., 2 B. W. O. C. 164.....678	Vall v. Page, 175 Ind. 126...296
Tien v. Louisville, etc., R. Co., 15 Ind. App. 304.....274	Valentini v. Canall, L. R. 24 Q. B. 166158
Tifton, etc., R. Co. v. Bedgood & Co., 116 Ga. 945..... 27	Vandalia Coal Co. v. Bland, 59 Ind. App. 308.....241
Timmons v. Gochenour, (Ind. App.) 117 N. E. 279.....653	Vandalia R. Co. v. Parker, 61 Ind. App. 146.....528
Title, etc., Trust Co. v. Haven, 196 N. Y. 487.....434	— v. Railroad Commission, etc., 182 Ind. 382.....129
Title Guaranty, etc., Co. v. State, ex rel., 61 Ind. App. 268 46	— v. Stevens, 67 Ind. App. 238653
Toledo, etc., R. Co. v. Howes, 68 Ind. 458685	— v. Stillwell, 181 Ind. 267.236
Totten & Hogg Iron, etc., Co. v. Muncie Nail Co., 148 Ind. 372698	— v. Stringer, 182 Ind. 676 207, 214
Treloar v. Harris, 65 Ind. App. 22191	Vandercook v. Williams, 106 Ind. 345297
Troyer v. Dyar, 102 Ind. 396...300	Vanderpool v. Vanderpool, 163 Ky. 742107
Tucker v. Eastridge, 51 Ind. App. 632159	Vanduyn v. Hepner, 45 Ind. 589328
Tuttle v. Fowler, 183 Ind. 99...167	Van Pelt v. Corwine, 6 Ind. 363162
	Vansickle v. Shenk, 150 Ind. 413690
Unger v. Mellinger, 37 Ind. App. 639327	Vaughan v. Godman, 94 Ind. 191 34
Union Frat. League v. Sweet- ney, 184 Ind. 378563	Vennen v. New Dells Lumber Co., 161 Wis. 370.....482
Union Pacific R. Co. v. Wyler, 158 U. S. 285.....211	Vessels v. Metropolitan St. R. Co., 129 Mo. App. 708.....367
Union Sanitary Mfg. Co. v. Davis, 64 Ind. App. 227....512	Vogler v. Geiss, 51 Md. 407... 60
— v. —, 63 Ind. App. 548.510	Vollmer v. Board, etc., 53 Ind. App. 149243
Union Traction Co. v. Ha- worth, 187 Ind. 451.....615	Wabash, etc., R. Co. v. Lash, 103 Ind. 80.....194
United Paperboard Co. v. Lewis, 65 Ind. App. 356...515	Wabash R. Co. v. Engleman, 160 Ind. 329447
United States Bank v. Bank of Georgia, 10 Wheat. 333.. 424, 425	— v. Miller, 18 Ind. App. 549274
United States Casualty Co. v. Griffs, 186 Ind. 126.....483	Wachstetter v. Johnson, 61 Ind. App. 659381

Waldo v. Wallace, 12 Ind. 569	297	Wilkinson v. Bixler, 88 Ind. 574	181
Wallace v. Lawyer, 91 Ind. 128	685, 696	Willcuts v. Northwestern, etc., Ins. Co., 81 Ind. 300...	536, 541
Walter A. Wood, etc., Co. v. Angemeler, 51 Ind. App. 258	15	Williams v. Chapman, 160 Ind. 130	259
— v. Irons, 10 Ind. App. 454	704	— v. Tishomingo Savings Inst., 57 Miss. 633.....	435
Waltman v. Rund, 109 Ind. 366	668	— v. Wood, 60 Ind. App. 69	181, 324
Warbritton v. Demorett, 129 Ind. 346	636	Williams, etc., Co. v. Marsh- burn, 15 Ga. App. 614.....	818
Warburton v. Crouch, 108 Ind. 83	562	Williamson v. Brandenburg, 133 Ind. 594.....	85
Warner v. Arctic Ice Co., 74 Me. 475	317	— v. Walker, 24 Ga. 257...	74
— v. Jennings, 44 Ind. App. 574	527, 566, 615	Willson v. Cleaveland, 30 Cal. 192	60
— v. Marshall, 166 Ind. 83	34, 35, 36	Willson v. Nat. Fowler Bank, 47 Ind. App. 689.....	608
Washburn v. Van Steenwyk, 32 Minn. 336.....	382	Wingler v. Simpson, 93 Ind. 201	463
Wasem v. Raben, 45 Ind. App. 221	640	Wishmier v. Behmyer, 30 Ind. 102	457
Wayne Pike Co. v. State, ex rel., 134 Ind. 672.....	376	Wolf v. Akin, 55 Ind. App. 589	261
Webb v. John Hancock, etc., Ins. Co., 162 Ind. 616.....	300	— v. Schofield, 38 Ind. 175..	602
Weideroder v. Mace, 184 Ind. 242	705	Wolfe v. McMillan, 117 Ind. 587	110
Welch v. Sherer, 93 Ill. 64....	698	Wood v. Wood, 51 Ind. 141...	282
Welker v. Appleman, 44 Ind. App. 699	196	Wood, Err., v. Matlock, 19 Ind. App. 364.....	98
Wellington v. Reynolds, 177 Ind. 49	261	Woodhouse v. Powles, 43 Wash. 617	102
Wells v. New England, etc., Ins. Co., 191 Pa. St. 207...	553	Wright v. Detroit, etc., R. Co., 77 Mich. 123	367
Wells, etc., Co. v. Kapaczyn- ski, 218 Ill. 149.....	9	Wulschner-Stewart Music Co. v. Hubbard, 44 Ind. App. 526	77
Westfall v. Walt, 165 Ind. 353	102	Wysor Land Co. v. Jones, 24 Ind. App. 451.....	608
Westphal v. Williams, (Ind.) 107 N. E. 91.....	108	Yeaman v. Galveston City Co., 106 Tex. 389.....	416
Wheatcraft v. Myers, 57 Ind. App. 371	86	Yost v. State, ex rel., 80 Ind. 350	341
Wheatly v. Miscal, 5 Ind. 142.	162	Young v. Biehl, 166 Ind. 357	330, 382
Whitcomb v. Joslyn, 51 Vt. 79	158	Zappala v. Industrial Ins. Comm., 82 Wash. 314.....	494
White v. State, ex rel., 183 Ind. 649	45	Zeitlow v. Smock, 65 Ind. App. 643	40
Whitesell v. Strickler, 167 Ind. 602	526	Zikos v. Oregon, etc., Naviga- tion Co., 179 Fed. 893..	208, 209
Whittenberger v. Bower, 158 Ind. 673	562	Zink v. Dick, 1 Ind. App. 269..	70
Wilburn v. Wilburn, 83 Ind. 55	556		

STATUTES CITED AND CONSTRUED

Constitution, U. S., Art. 4, §19.....	446
35 Stat. at L. 65.....	7
36 Stat. at L. 291.....	7
Constitution, Art. 15, §2.....	117
Section 343a Burns' Supp. 1918.....	252
Section 691a Burns' Supp. 1918.....	629
Section 691c Burns' Supp. 1918.....	167
Section 8020c2 Burns' Supp. 1918.....	404, 405
Section 80201 Burns' Supp. 1918.....	309, 469, 476, 576, 579, 655, 675
Section 8020o1 Burns' Supp. 1918.....	404
Section 8020q2 Burns' Supp. 1918.....	388, 589, 678
Section 8020s2 Burns' Supp. 1918.....	337, 404, 495
Section 294 Burns 1914.....	525
Section 295 Burns 1914.....	329
Section 302 Burns 1914.....	525
Section 344 Burns 1914.....	5, 206, 213, 266, 536, 551
Section 348 Burns 1914.....	521, 536
Section 352 Burns 1914.....	376
Section 356 Burns 1914.....	376
Section 362 Burns 1914.....	358
Section 368 Burns 1914.....	704
Section 400 Burns 1914.....	539
Section 558 Burns 1914.....	196, 254, 359
Section 561 Burns 1914.....	98, 196, 197
Section 587 Burns 1914.....	289
Section 671 Burns 1914.....	15, 282, 283, 284, 286, 287, 288, 289
Section 681 Burns 1914.....	629
Section 700 Burns 1914.....	46, 563, 653, 670
Section 702 Burns 1914.....	699
Section 728 Burns 1914.....	688, 689
Section 766 Burns 1914.....	688, 690
Section 859 Burns 1914.....	684
Section 865 Burns 1914.....	684
Section 1116 Burns 1914.....	103
Section 1392 Burns 1914.....	15, 282, 283, 284, 285, 286, 288
Section 1394 Burns 1914.....	282, 283
Section 1635 Burns 1914.....	450
Section 1644 Burns 1914.....	449
Section 1646 Burns 1914.....	450
Section 1749 Burns 1914.....	151
Section 2977 Burns 1914.....	283, 284, 285, 286, 288, 290
Section 2978 Burns 1914.....	283, 284, 285
Section 3027 Burns 1914.....	381
Section 3029 Burns 1914.....	381
Section 3952 Burns 1914.....	327
Section 4012 Burns 1914.....	108
Section 4753 Burns 1914.....	538
Section 5431 Burns 1914.....	368
Sections 5436-5442 Burns 1914.....	17
Section 5654 Burns 1914.....	127
Sections 5676, 5677 Burns 1914.....	128
Section 5918 Burns 1914.....	183
Section 5944 Burns 1914.....	184

Section 5962 Burns 1914.....	185
Section 6106 Burns 1914.....	190
Section 7649 Burns 1914.....	172
Section 7655 Burns 1914.....	177, 179, 181
Section 7659 Burns 1914.....	177, 178, 182
Section 7662 Burns 1914.....	176
Section 8020a Burns 1914.....	235, 248, 651
Section 8063 Burns 1914.....	377
Section 8639 Burns 1914.....	242
Sections 8654, 8655 Burns 1914.....	243
Section 8658 Burns 1914.....	243, 244, 245
Section 8659 Burns 1914.....	243
Section 8681 Burns 1914.....	243
Section 2632 Burns 1914.....	117, 243
Section 8684, 8685 Burns 1914.....	243
Section 8687 Burns 1914.....	243, 245
Section 8688 Burns 1914.....	243, 244, 245
Section 8695 Burns 1914.....	117
Section 8710 Burns 1914.....	294
Section 8714 Burns 1914.....	295
Section 8716 Burns 1914.....	294, 300
Sections 8901-8903 Burns 1914.....	668
Section 9005 Burns 1914.....	573
Section 9071 Burns 1914.....	687
Section 9089c7 Burns 1914.....	433
Sections 9269, 9270 Burns 1914.....	442
Section 10310 Burns 1914.....	269
Section 348 Burns 1908.....	26
Section 561 Burns 1908.....	98
Section 292 R. S. 1881.....	525
Section 293 R. S. 1881.....	329
Section 300 R. S. 1881.....	525
Section 347 R. S. 1881.....	376
Section 351 R. S. 1881.....	376
Section 362 R. S. 1881.....	704
Section 391 R. S. 1881.....	539
Section 533 R. S. 1881.....	196, 254, 359
Section 632 R. S. 1881.....	15, 282, 286
Section 646 R. S. 1881.....	285
Section 658 R. S. 1881.....	46, 563, 653, 670
Section 660 R. S. 1881.....	699
Section 686 R. S. 1881.....	688
Section 724 R. S. 1881.....	688
Section 816 R. S. 1881.....	684
Section 822 R. S. 1881.....	684
Section 1070 R. S. 1881.....	103
Section 1460 R. S. 1881.....	151
Section 2489 R. S. 1881.....	381
Section 2491 R. S. 1881.....	381
Section 2921 R. S. 1881.....	327
Section 2969 R. S. 1881.....	108
Sections 3250, 3251 R. S. 1881.....	668
Section 4020 R. S. 1881.....	368
Sections 4025-4061 R. S. 1881.....	17
Section 5025 R. S. 1881.....	179
Section 5237 R. S. 1881.....	377
2 R. S. 1876 p. 232.....	685
2 R. S. 1876 p. 245.....	284, 285
2 R. S. 1876 p. 557.....	284

R. S. 1852 p. 312.....	179
Acts 1889 p. 124.....	442
Acts 1897 p. 141.....	269
Acts 1897 p. 233.....	668
Acts 1897 p. 318.....	538
Acts 1899 p. 58.....	358
Acts 1899 p. 219.....	442
Acts 1899 p. 343.....	183
Acts 1901 p. 348.....	668
Acts 1901 p. 461.....	128, 132
Acts 1901 p. 565.....	282
Acts 1903 p. 330.....	127
Acts 1903 p. 338.....	97
Acts 1905 p. 219.....	117, 242, 573
Acts 1905 p. 236.....	294
Acts 1905 p. 383.....	668
Acts 1905 p. 521.....	172
Acts 1907 p. 59.....	449, 450
Acts 1907 p. 221.....	450
Acts 1907 p. 237.....	15, 282
Acts 1907 p. 443.....	172
Acts 1907 p. 652.....	98, 196
Acts 1909 p. 412.....	294
Acts 1911 p. 145.....	235, 248, 522, 651
Acts 1911 p. 415.....	5, 26, 29, 206, 266, 536, 551
Acts 1913 p. 11.....	179
Acts 1913 p. 120.....	433
Acts 1913 p. 340.....	190
Acts 1913 p. 848.....	289
Acts 1915 p. 123.....	252
Acts 1915 p. 392.....	309, 312, 404, 405, 469, 471, 472, 476, 576, 655, 657, 675, 676
Acts 1917 p. 154.....	337, 394, 495, 576, 589, 678
Acts 1917 p. 155.....	388
Acts 1917 p. 523.....	167, 168, 629, 631

TEXT-BOOKS CITED

11 Am. and Eng. Ency. Law 59, 60385	Gillett, Indirect and Collateral Ev. 291, 341, 349, 351, 352... 46
15 Am. and Eng. Ency. Law (2d ed.) 855, 856.....640	25 Harvard Law Review p. 328491
1 C. J. 683.....623	High, Receivers (4th ed.) §396 53
1 C. J. 708.....623	1 Honnold, Workmen's Com- pensation 525578
2 C. J. 493, 504.....627	Mechem, Public Officers §§315- 322119
2 C. J. 519.....614	— §445118
3 C. J. 467.....178	2 Morse, Banks and Banking (4th ed.) §463.....424
3 C. J. 680..... 81	2 Parsons, Bills and Notes 588435
7 C. J. 688, 689.....424	Pollock, Principles of Con- tracts (6th ed.) 454..... 27
7 C. J. 688-691.....427	2, 3 Pomeroy, Eq. Jurisp. (4th ed.) §§956, 958, 963, 1062, 1077142
7 C. J. 692-695.....428	2 R. C. L. 63..... 81
8 C. J. 608-609.....424	3 R. C. L. 615.....424
15 C. J. 918.....507	5 R. C. L. 479-481.....433
15 C. J. 919.....508	5 R. C. L. 551, 552.....437
Clark, Contracts 472.....187	5 R. C. L. 552-554.....424
2 Cyc 286.....224	5 R. C. L. 554, 555.....423
2 Cyc 653..... 81	5 R. C. L. 681.....698
4 Cyc 22..... 27	6 R. C. L. 816.....188
5 Cyc 930, 933.....463	7 R. C. L. 1000.....507
9 Cyc 566.....188	8 R. C. L. 431..... 86
9 Cyc 731, 732.....537	8 R. C. L. 453..... 86
11 Cyc 745.....507	8 R. C. L. 579-588..... 86
16 Cyc 686.....351	10 R. C. L. 946.....529
16 Cyc 1148, 1176..... 46	12 R. C. L. 355.....529
17 Cyc 940, 968, 971.....689	13 R. C. L. 1168.....640
20 Cyc 130-132..... 85	14 R. C. L. 955.....306
21 Cyc 1240.....640	15 R. C. L. 844.....180
21 Cyc 1663.....640	17 R. C. L. 710.....327
30 Cyc 458.....142	2 Sedgwick, Damages (9th ed.) §§762, 777 85
32 Cyc 1344.....566	Story, Bills of Exchange §225.435
34 Cyc 958.....636	2 Story, Equity §1077.....382
35 Cyc 390, 415.....318	Vance, Insurance 439.....306
35 Cyc 587.....602	1 Walt, Actions and Defenses 106188
35 Cyc 594.....603	
37 Cyc 466, 467.....399	
38 Cyc 136.....541	
38 Cyc 1363.....359	
1 Daniel, Negotiable Instru- ments (6th ed.) §§670-672..434	
2 Daniel, Negotiable Instru- ments (6th ed.) §1365.....437	
— §§1651, 1652.....434	
— §§1654a, 1655, 1655a, 1656, 424	
— §1657424, 427, 434	
4 Dillon, Mun. Corp. (5th ed.) §1652572	
19 Ency. Pl. and Pr. 66.....602	

Washburn, Easements and Servitudes (4th ed.) 111..351	1 Wigmore, Ev. §41.....497
Wharton, Negligence (2d ed.) §219 10	Wood, Limitations (4th ed.) §200327
	Work's Practice §606.....300

JUDGES
OF THE
APPELLATE COURT
OF THE
STATE OF INDIANA

DURING THE PERIOD COMPRISED IN THIS VOLUME

HON. JOSEPH G. IBACH ¶ *
HON. FRED S. CALDWELL †
HON. ETHAN A. DAUSMAN §
HON. IRA C. BATMAN §
HON. EDWARD W. FELT *
HON. MILTON B. HOTTEL *

¶ Chief Judge, November Term, 1917.

† Appointed September 1, 1913, and elected in 1914.

§ Elected in 1916.

OFFICERS
OF THE
APPELLATE COURT

ATTORNEY-GENERAL,
ELE STANSBURY

REPORTER,
WILL H. ADAMS

CLERK,
P. J. LYNCH

SHERIFF,
GEORGE D. ABRAHAM

LIBRARIAN,
CHARLES E. EDWARDS

CASES DECIDED
IN THE
APPELLATE COURT
OF THE
STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1918, AND NOVEMBER TERM,
1918, IN THE ONE HUNDRED SECOND YEAR
OF THE STATE.

VANDALIA RAILROAD COMPANY *v.* KENDALL.

[No. 9,525. Filed June 5, 1918.]

1. **APPEAL.—Review.—Exceptions.—Identity.—Waiver.**—In a servant's action under the federal Employers' Liability Act for injuries sustained in attempting to board a moving train as ordered by his foreman, the objection on appeal that the complaint discloses that the proximate cause of the plaintiff's injury was the slipping of his foot, and not the giving of the order to board the train, is inconsistent with the objection that the plaintiff assumed the risk and was guilty of contributory negligence, urged below in the memorandum to a demurrer challenging the complaint on the ground of insufficiency of facts; hence such objection is of no avail, in view of Acts 1911 p. 415, §344 Burns 1914. p. 5.
2. **MASTER AND SERVANT.—Injuries to Servant.—Order to Board Master's Train.**—In a servant's action under the federal Employers' Liability Act, where the complaint alleged in substance that the plaintiff was employed as a lineman and had the right to ride on the defendant's trains, that his foreman negligently ordered him to board the moving train in order to go to another point on the defendant's road to work, and that in attempting to get on the train his foot slipped and he fell to his injury, it was not necessary to show that the foreman's order was of a formal imperative character. p. 8.
3. **MASTER AND SERVANT.—Injuries to Servant.—Special Order of Foreman.—Order of Master.**—The order by a line foreman to a lineman to board a moving train in order to go to another

part of the line for work was a special order; and the giving of such order was the business of the master. p. 8.

4. MASTER AND SERVANT.—*Injuries to Servant.—Negligence.—Jury Question.*—Whether a line foreman, in ordering a lineman to board a moving train, was negligent under the circumstances was a question for the jury. p. 8.
5. MASTER AND SERVANT.—*Injuries to Servant.—Federal Employers' Liability Act.—Assumption of Risk.*—Under the federal Employers' Liability Act, assumption of risk as a defense is removed only in cases where the violation by the common carrier of a statute enacted for the safety of employees contributed to the injury. p. 8.
6. MASTER AND SERVANT.—*Injuries to Servant.—Assumption of Risk.*—A servant injured while obeying a direct command of the master does not assume the risk, unless the danger is so great and imminent that a reasonably prudent person would not assume it. p. 9.
7. MASTER AND SERVANT.—*Injuries to Servant.—Order to Board Train.—Servant's Appreciation of Danger.—Jury Question.*—Whether a servant fully understood and appreciated the danger of obeying an order of the master is ordinarily a question for the jury. p. 10.
8. MASTER AND SERVANT.—*Injuries to Servant.—Assumption of Risk.*—Where one clothed by the master with authority to direct the work and a servant to whom directions are given do not stand upon an equal footing, it cannot be said as a matter of law that the servant is precluded recovery on the grounds that he assumed the risk. p. 11.
9. MASTER AND SERVANT.—*Injuries to Servant.—Proximate Cause.—Jury Question.*—In a servant's action for injuries sustained in attempting to board a moving train, whether the order of the foreman to board the train was the proximate cause of the injuries was a question for the jury, there being some evidence supporting the verdict on that issue. p. 11.

From Marion Superior Court (91,925); *Linn D. Hay*, Judge.

Action by Hamar A. Kendall against the Vandalia Railroad Company. From a judgment for the plaintiff, the defendant appeals. *Affirmed.*

Pickens, Moores, Davidson & Pickens and *D. P. Williams*, for appellant.

Wymond J. Beckett and William F. Elliott, for appellee.

IBACH, J.—Appellee recovered judgment against appellant for damages on account of personal injuries received by him while in its employ. Appellant is a consolidated corporation and operates and controls a railroad extending into and through the States of Indiana, Illinois, and Missouri, and at the time appellee received his injuries was a common carrier and engaged in commerce between the said states. Appellee received his injuries while he was employed by appellant in interstate commerce.

On April 4, 1913, appellee was employed by appellant and engaged in the repair of its telegraph wires and lines. While in such employ appellee had the right and privilege to ride upon appellant's freight trains and engines in moving from one part of the line to another. On said date one Ralph Anderson was also in appellant's employ. Anderson had the right to direct appellee in his work, where he should work, and what work he should do. Appellee was bound to obey and conform to any order or direction of said Anderson, and did obey and conform to his orders. In going to and from places of work on appellant's road appellee did ride upon its engines and cars, both freight and passenger. On the date given appellee was at work for appellant under the direction of Anderson in the city of Terre Haute, and the latter was riding upon "the locomotive of a freight train that was moving through the city of Terre Haute at about the rate of four or five miles an hour * * * While said train was so moving * * * Anderson *negligently* ordered and directed this plaintiff to board said train in order to go to another

point on defendant's road to perform work and labor, and that he obeyed said order and direction of said Anderson and attempted to get onto said freight train * * * and that while attempting to board said freight car, as aforesaid, his foot slipped and he fell from and under said train and was injured. * * * That he was injured by reason of the said negligence of said Anderson, said injury resulting from his obedience and conformity to the said order of said Anderson to board said moving train."

Omitting the description of appellee's injuries and mere formal parts, the substance of the second paragraph of complaint (upon which the cause was tried) is as above stated.

Appellant demurred to this complaint for want of facts, and in its memorandum pointed out two objections, viz.: "(1) Upon the facts alleged in this paragraph the plaintiff's injury resulted from his risk in attempting to board the moving engine, which risk was a risk of his employment, and there was no violation by the defendant of a statute enacted for the safety of employes. (2) The facts alleged show that the injuries of the plaintiff were caused by his own contributory negligence."

This demurrer was overruled and general denial filed. There was a trial by jury and verdict for appellee. Appellant assigns as error the ruling on the demurrer and the overruling of its motion for a new trial.

Prior to filing his brief on the merits appellee moved to dismiss this appeal on the grounds that appellant's brief presents no question. The ruling on such motion was reserved until now. Without going into detailed discussion we have examined appel-

lant's brief in connection with appellee's objections and conclude that, while subject to criticism, it is sufficient to present some question. To the extent that the questions can be determined they will be considered.

Appellee claims that no question is presented by the first assignment for the reason that the objection now urged is not the objection urged in the trial court, and that the objections there made are waived.

The objection here presented is as follows: "The complaint discloses that the proximate cause of appellee's injury was the slipping of his foot and

1. not the giving of the order to board the train."

Appellant admits that it did not use the language of the objections in the memorandum, but insists that the objection just quoted is in effect and substantially the same as the points raised under its demurrer in the trial court. The objections in the trial court were in brief that appellee assumed the risk and was guilty of contributory negligence. The position now taken would render both of the original objections immaterial, as the complaint might be sufficient with respect to both and yet be defective as to the objection relied on. It seems to us that the position here is inconsistent with that taken in the trial court, and therefore forbidden not only by the express statute, but by a long line of holdings as well. Acts 1911 p. 415, §2, §344 Burns 1914; *Stiles v. Hasler* (1913), 56 Ind. App. 88, 92, 93, 104 N. E. 878; *Boes v. Grand Rapids, etc., R. Co.* (1915), 59 Ind. App. 271, 278, 279, 108 N. E. 174, 109 N. E. 411; *Carter v. Caldwell* (1915), 183 Ind. 434, 436, 109 N. E. 355, and cases cited.

Appellant claims the verdict is not sustained by

sufficient evidence and is contrary to law. The particular objections are: (1) That the order was not a negligent one; (2) that the evidence shows that the injuries were not caused either in whole or in part by the negligence of appellant, but were caused by the slipping of appellee's foot in boarding the engine; (3) that appellee assumed the risk of slipping on the stirrup.

The following evidence is pertinent to these questions: Appellee was a lineman and his duties were to put up telephone and telegraph wires and to start signal wires. He had worked for appellant company for about a month prior to his injury. Prior to the day of his injury he was working with a gang, and on the particular day was left to help a man named Anderson. Anderson was the division lineman for that part of appellant's system just west of the city of Terre Haute where the injury occurred. Appellee had permission to ride appellant's trains, but it was no part of his duty to get on or off moving trains. The instructions of the foreman of the gang were that he (appellee) was to stay and work with Anderson, "assist the division lineman." Left him "under" Anderson. Appellee first met Anderson at the station, where he said to appellee, "We will go to West Terre Haute." The line at this point was torn down by the flood for quite a distance. After working in this vicinity until almost noon appellee went to where they had unloaded a boat for the purpose of assisting in putting it in the water for use in their work, when a train came along with Anderson and a man named Ritzell on the front of the engine. They had gone back to Terre Haute and obtained some shelter boxes and had these on the engine with them. Appellee had

found some tools lost by Anderson and stepped across the track to the north side to give them to him when Anderson motioned him to the other side of the track. When they got a little closer Anderson told him to "Get on, get on," which appellee immediately attempted to do. The train was running not more than five or six miles an hour. He tried to get on just an instant after Anderson told him to,—on the first car back of the engine. He had with him his lineman tools and a pair of blocks. "I got on at the side ladder, as they call it, and stepped up to a kind of brace they have around in there to step on—I just stepped on that with one foot, and I never got any further; I fell." When Anderson told him to get on he was "right on the other side of the engine * * * 20 or 30 feet." The track was sandy at this point and was wet down on the edge where the water was and where they had been working. It was not very firm because it had just been filled in there. "I supposed they were going down to put up the shelter boxes. All the idea I could have had was from the boxes on the front end of the train."

The statute (Act April 22, 1908, as amended, Act April 5, 1910, 35 Stat. at L. 65, 36 Stat. at L. 291), so far as applicable here, provides in brief that all common carriers engaged in interstate commerce shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce for such injury resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier; that in all actions brought thereunder contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence at-

tributable to such employe; that in any action brought against any common carrier under or by virtue of any of the provisions of such act to recover damages for injuries to any of its employes, such employe shall not be held to have assumed the risks of his employment in any case where the violation of such common carrier of any statute enacted for the safety of employes contributed to the injury of such employe.

Under the theory of the complaint it was not necessary to show that the directions to board the train were of a formal imperative character. *Stephens v. Hannibal, etc., R. Co.* (1888), 96 Mo. 207, 9 S. W. 589, 9 Am. St. 336; *Pickett v. Quincy, etc., R. Co.* (1911), 156 Mo. App. 272,

2. 137 S. W. 636. The order in this case was a special one. The giving of a special order in furtherance of the master's business is the business of the master. *Standard Cement Co. v. Minor* (1913), 54 Ind. App. 301, 100 N. E. 767.

Whether or not the order or direction given to board the train was negligent under the circumstances was for the jury. *Chicago, etc., R. Co.*

4. *v. Sanders* (1908), 42 Ind. App. 585, 86 N. E. 430; *Republic Iron, etc., Co. v. Berkes* (1903), 162 Ind. 517, 70 N. E. 815.

Under the federal act assumption of risk as a defense is removed only in cases where the violation by the common carrier of a statute enacted for

5. the safety of employes contributed to the injury. *Cincinnati, etc., R. Co. v. Gross* (1913), (Ind. App.) 111 N. E. 653; *Seaboard Air Line Railway v. Horton* (1913), 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C 1, Ann. Cas. 1915B 475.

A great deal of confusion will be found among the decided cases on the effect of an order by the master, or his agent having authority to direct a certain

6. work, upon the defense of assumption of risk.

The rule adopted in this state seems to be that if a servant is injured while obeying a direct command of the master he will not be held to assume the risk, unless the danger is so great and imminent that a reasonably prudent person would not assume it. *Mellette v. Indianapolis, etc., Traction Co.* (1909), 45 Ind. App. 88, 86 N. E. 432; *Brazil Block Coal Co. v. Hoodlet* (1891), 129 Ind. 327, 336, 27 N. E. 741. The reasoning for this view is that by giving the direct command to perform the work the master takes upon himself the risks which otherwise would be assumed by the servant. The servant does not stand on the same footing with the master. His primary duty is obedience, and, if when in the discharge of that duty he is damaged through the neglect of the master, it is proper that he should be recompensed. It is upon this inequality of positions that it is held that a prudent man has a right, within reasonable limits, to rely upon the ability and skill of the agent in whose charge the common master has placed him, and is not bound at his peril to set his own judgment above that of his superior. *Republic Iron, etc., Co. v. Berkes, supra*; *Standard Cement Co. v. Minor, supra*; *Brazil Block Coal Co. v. Hoodlet, supra*. See, also, *Wells, etc., Co. v. Kapaczynski* (1905), 218 Ill. 149, 75 N. E. 751; *Chicago, etc., Brick Co. v. Sobkowiak* (1894), 148 Ill. 573, 36 N. E. 572. In the case last cited the court uses this language: "When an act is performed by a servant in obedience to a command from one having authority to give it, and the performance of the act is attendant with a degree of

danger, yet in such case it is not requisite that such servant shall balance the degree of danger, and decide with absolute certainty whether he must do the act, or refrain from it * * *.”

In considering the question a distinction is made between an order in the nature of a general direction as to the work which would not have in it anything of coercion whatsoever, while the danger might be one thoroughly known and appreciated by the servant, and an order which might be of such an urgent character and given in such a direct and imperious manner that the servant's free will would be, in part at least, overcome. *Standard Cement Co. v. Minor, supra*; *Stucke v. Orleans R. Co.* (1898), 50 La. Ann. 172, 188, 23 South. 342; *Lee v. Woolsey* (1885), 109 Pa. St. 124. In the case last cited it is said: “If an employe is in haste called upon to execute an order requiring prompt attention, he is not to be presumed necessarily to recollect a defect in machinery, or a particular danger connected with his employment, so as to avoid it. A prompt and faithful employe suddenly called upon by a superior to do a particular act cannot be supposed to remember at the moment a particular danger incident to its performance, of which he had previous knowledge; and it would be most unreasonable to demand of him the thought and care which might be exacted when there is more time for observation and deliberation.” See also Wharton, *Negligence* (2d ed.) §219.

Whether or not the servant fully understood and appreciated the danger of obeying an order is ordinarily a question for the jury. *Shannon v.*

7. *Shaw* (1909), 201 Mass. 393, 87 N. E. 748; *Cook v. St. Paul, etc., R. Co.* (1885), 34 Minn. 45, 24 N. W. 311.

Where the servant clothed by the master with the authority to direct the work and the servant to whom the directions are given do not stand upon an

8. equal footing, it cannot be said as a matter of law that the servant is precluded recovery upon the ground that he assumed the risk. *Chicago, etc., R. Co. v. Sanders, supra.*

The question of proximate cause was one for the jury. There is evidence from which the jury could find that the giving of the order was the proximate,

9. or at least a concurring, cause of the injury. *Davis v. Mercer Lumber Co.* (1904), 164 Ind. 413, 423, 73 N. E. 899; *King v. Inland Steel Co.* (1911), 177 Ind. 201, 96 N. E. 337, 97 N. E. 529; *Louisville, etc., Lighting Co. v. Hynes* (1910), 47 Ind. App. 507, 91 N. E. 962; *Beaning v. South Bend Electric Co.* (1909), 45 Ind. App. 267, 90 N. E. 786. Taking the evidence as a whole, it is sufficient to sustain the verdict of the jury, and the verdict is not contrary to law.

It is finally insisted that the court erred in the giving of instruction No. 11. It is claimed that this instruction is erroneous because the jury were in effect informed that appellee *did not assume the risk* of complying with said order *if he used reasonable care*. The instruction was applicable to the facts, and, when considered with the other instructions and the legal principles herein announced, it was not erroneous. *Brazil Block Coal Co. v. Hoodlet, supra.*

No reversible error being shown, the judgment of the trial court is affirmed.

NOTE.—Reported in 119 N. E. 816. Master and servant: negligence as a defense under federal Employers' Liability Act, notes 47 L. R. A. (N. S.) 61, and L. R. A. 1915C 65; assumption of risk as a defense under federal Employers' Liability Act, notes 47 L. R. A. (N. S.) 62 L. R. A. 1915C 69.

James v. Wilson—68 Ind. App. 12.

JAMES v. WILSON ET AL.

[No. 9,633. Filed June 5, 1918.]

1. **APPEAL.—Assignments of Error.—Sufficiency.**—Where three parties were made defendants to the plaintiff's amended complaint, which contained two paragraphs, and the record shows a separate and several demurrer filed by two defendants to each paragraph of complaint, an assignment of error that "the court erred in sustaining a demurrer to the amended complaint" presents no question for review, and necessitates a dismissal of the appeal, since the appellant is confined to the assignment of error as written. p. 14.
2. **APPEAL.—"Final Judgment."**—An appeal governed by §671 Burns 1914, §632 R. S. 1881, authorizing appeals from final judgments only, will be dismissed where the record shows no judgment whatever as to one of the defendants, since a judgment is not final unless it disposes of the subject-matter of the action as to all the parties so far as the court has power to dispose of it. p. 15.

From St. Joseph Circuit Court; *Walter A. Funk*, Judge.

Action by Eva James against John H. Wilson and others. From a judgment for the defendants, the plaintiff appeals. *Appeal dismissed.*

Romine & Romine, for appellant.

George A. Kurtz, for appellee.

HOTTEL, J.—The facts which gave rise to the action in which the judgment herein appealed from was rendered are in substance as follows: On April 28, 1913, in a proceeding for divorce then pending in the St. Joseph Circuit Court, between appellant and appellee John H. Wilson, a divorce was granted the latter, and a judgment for alimony was rendered in favor of appellant for \$100. Appellee John H. Wilson, by said judgment, was also directed to pay to appellant

the sum of \$4 per week for the support of their two minor children. Prior to such judgment and while appellant and John H. Wilson were living together as husband and wife, the latter entered into a contract with appellee Jay C. Bowsher for the purchase of a house and lot in the city of Mishawaka. On March 21, 1914, said Wilson had paid on said contract the sum of \$800, and on said day assigned his interest in said contract to his coappellee Margaret Wilson, then Margaret Krause. At the time appellant filed the present action there was due her on her judgment for alimony and for the support of her minor children \$325, and in said action she sought to have said assignment of said contract for the purchase of said real estate set aside and held for naught and to have the interest of John H. Wilson declared subject to the payment of said balance due appellant on her said judgment for alimony and the support of her minor children.

Appellant's complaint is in two paragraphs, which are not materially different. They each proceed on the theory that said assignment to Margaret Wilson was fraudulently made without any consideration and with intent to hinder, delay, and defraud appellant. They each allege that appellee John H. Wilson neither at the time of making said assignment, nor at any time since, had any other property subject to execution, but during all of said time was insolvent; that his coappellee Margaret Wilson had knowledge of all of said facts, etc. Appellee "Bowsher is made a party defendant to answer whatever interest he may have in the above described premises."

Appellees Wilson and Wilson demurred "separately and severally * * * to each paragraph of * * * amended complaint." This demurrer was

sustained to both paragraphs, and judgment rendered on the demurrer. The record shows no disposition of the case as to appellee Bowsher. The only error assigned is as follows: "The court erred in sustaining the demurrer to the amended complaint."

As we have already indicated, there were three persons made defendants to appellant's amended complaint, and it was in two paragraphs. Any one or more of said defendants, or all of them, may have demurred to said complaint or either or each paragraph thereof. The assignment of error here relied on does not indicate whose demurrer is challenged, nor in any other way attempt to specify or identify the particular ruling of the trial court which is intended to be challenged by said assigned error, except that it is a ruling on a demurrer.

While the rules of the court do not require us to search the record to find error, we have in this case examined the record, and find that it shows a

1. demurrer filed by appellees Wilson and Wilson which is separate and several and addressed to *each paragraph* of the amended complaint. As above indicated, the ruling assigned as error is a ruling on a demurrer to the amended complaint, and not a ruling on a demurrer to *each paragraph* of such complaint. "It is the general rule, and one which has been strictly adhered to, that the appellant is confined to his assignment of errors as written, and that each error assigned must be so complete, specific and certain, as to clearly indicate the identity of the particular ruling upon which the error is predicated." *Mesher v. Bishop* (1914), 56 Ind. App. 455, 460, 103 N. E. 492, 105 N. E. 644; *Walter A. Wood, etc., Co.*

v. *Angemeier* (1912), 51 Ind. App. 258, 99 N. E. 500, and cases there cited; *Kelley v. Scanlan* (1913), 55 Ind. App. 611, 613, 104 N. E. 516, and cases there cited. These cases necessitate the conclusion that no question is presented by said assignment of error, and authorize a dismissal of the appeal.

The record discloses another ground for such dismissal. The right of appeal is conferred by statute.

The judgment herein involved is not an inter-

2. locutory order from which an appeal is authorized by §1392 Burns 1914, subdivisions 15-18 (Acts 1907 p. 237); and hence appellant's right of appeal, if it exists, must be found in the general provision for appeal contained in §671 Burns 1914, §632 R. S. 1881. This section authorizes appeals from final judgments only. We have already indicated that the record in this case shows no disposition of the case as to appellee Bowsher. As to him there is no judgment, final or otherwise. No steps are shown to have been taken as to him. In the case of *Northern, etc., Cable Co. v. Peoples Mutual Tel. Co.* (1915), 184 Ind. 267, 111 N. E. 4, the Supreme Court had before it a case very similar to that here involved, and in that case the court said: "A judgment is not final unless it disposes of the subject-matter of the action as to all of the parties so far as the court before which it is pending has power to dispose of it." See cases there cited, and *Hopp v. Luken* (1909), 44 Ind. App. 568, 89 N. E. 916; *Mak-Saw-Ba Club v. Coffin* (1907), 169 Ind. 204, 207, 213, 82 N. E. 461, and cases there cited.

For the reasons indicated, and upon the authorities cited *supra*, this appeal should be, and is, dismissed.

NOTE.—Reported in 119 N. E. 836.

CHICAGO AND ERIE RAILROAD COMPANY v. KEEFER.

[No. 9,571. Filed June 5, 1918.]

1. RAILROADS.—*Action for Killing Stock.—Circumstantial Evidence.*—In an action against a railroad company for killing a horse, under allegations that the horse escaped to the defendant's right of way and was killed by a train because of the defendant's failure to maintain a proper fence, as required by §§5436-5442 Burns 1914, §§4025-4081 R. S. 1881, the fact that a train struck or came in contact with the horse could be proved by circumstantial evidence. p. 17.
2. RAILROADS.—*Action for Killing Stock.—Sufficiency of Evidence.*—In an action against a railroad company for killing a horse, alleged to be due to the defendant's failure to maintain a proper fence, as required under §§5436-5442 Burns 1914, §§4025-4081 R. S. 1881, evidence that the horse escaped through the fence, that tracks indicated that it had run along the railroad track to a bridge and had started to cross the bridge, that its body was found in the bed of the stream below, that its neck was broken and its breast bruised, was insufficient to sustain a verdict for the plaintiff, there being no evidence that any trains passed over the railroad from the time the horse escaped until its dead body was found in the stream. p. 18.

From Huntington Circuit Court; *Claud Cline*, Special Judge.

Action by Mathias Keefer against the Chicago and Erie Railroad Company and another. From a judgment for the plaintiff, the named defendant appeals. *Reversed.*

W. M. Johnson, C. K. Lucas, Adams, Follansbee, Hawley & Shorey and *Mark H. Miller*, for appellant.
R. A. Kaufman and *Watkins & Butler*, for appellee.

CALDWELL, C. J.—Appellee brought this action against appellant and a construction company to recover the value of a horse alleged to have been run against and killed by one of appellant's trains. The

verdict and judgment were in favor of the construction company. The cause of action against appellant was predicated on §§5436-5442 Burns 1914, §§4025-4031 R. S. 1881, it being alleged that appellant failed to maintain a proper fence along its right of way, and that as a consequence appellee's horse escaped from his inclosure onto appellant's right of way and railroad, and was struck and killed as aforesaid. Verdict was returned, and judgment rendered in appellee's favor and against appellant for \$190. The material evidence, the sufficiency of which is challenged, was to the following effect: Appellant's railroad extends northwestward from Huntington through appellee's farm. Prior to May 10, 1913, appellant had completed an additional track along the east side of its old track, so that it was operating a double-track railroad through appellee's farm. Trains west bound used the northeast track and trains east bound used the southwest track. Along appellee's farm the tracks lay on an embankment about fifteen feet high. A few rods southeast of appellee's farm appellant's tracks extended over a bridge, the tracks on the bridge being fifteen to twenty feet above the bed of the stream. On the night of May 10, 1913, appellee's horse escaped from his field adjoining the railroad, and the next morning it was found lying dead in the bed of the stream north of the west end of the bridge.

The evidence was sufficient to establish that it escaped through the right of way fence, and that it strayed southward along the right of way and

1. tracks to where its body was found. There was no evidence on the subject of whether

trains traversed the railroad between the time

2. when the horse escaped and when it was discovered in the bed of the stream dead. It results that there was no direct evidence that a train struck or came in contact with the horse. Such facts may, however, be proved by circumstantial evidence. *Cleveland, etc., R. Co. v. Vincent* (1915), 60 Ind. App. 476, 109 N. E. 810. The circumstances shown by the evidence and bearing on the question of the manner in which the horse was killed were as follows: Tracks indicated that the horse had started across the bridge; that just before it reached the bridge, its tracks indicated that it was running along the east side of the east track; that when found the horse's neck was broken, and there was some hair gone off the breast. One witness testified that the horse "was bruised a little bit in his breast." There was no evidence of any other wounds or injuries, and no other circumstances indicating the manner in which the horse was killed. The evidence is not sufficient to sustain the verdict. See *Pittsburgh, etc., R. Co. v. Vance* (1914), 58 Ind. App. 1, 108 N. E. 158, where the subject is fully considered. Other questions presented are not decided.

Judgment reversed, with instructions to sustain the motion for a new trial. Since there is some question as to the sufficiency of the complaint, permission is granted to amend it if desired.

NOTE.—Reported in 119 N. E. 807. Railroads: liability for failure to fence right of way, 9 L. R. A. (N. S.) 347, L. R. A. 1915E 539.

NELSON ET AL. v. REIDELBACH, EXECUTOR.

[No. 9,709. Filed June 6, 1918.]

1. *APPEAL—Assignments of Error.—Waiver.*—Assignments of error relating to the sufficiency of a complaint, and to the ruling on a motion for new trial, are waived by the failure to state any propositions or points relative thereto. pp. 25, 30.
2. *APPEAL—Assignments of Error.—Preservation of Grounds.*—A complaint may not be attacked for insufficiency of facts by direct assignment of error on appeal, in view of Acts 1911 p. 415, §348 Burns 1914. p. 25.
3. *MORTGAGES.—Foreclosure.—Agreement to Postpone Action.—Breach.*—Where a mortgagee, pending foreclosure proceedings, made an agreement to postpone the action until the mortgagor paid off certain liens, to take a new mortgage and then to dismiss the action, the mortgagee's refusal to carry out the agreement as to the taking of the new mortgage and the dismissal of the action, after the mortgagor had paid off the liens mentioned in the agreement, was not a proper matter for a plea in abatement in the foreclosure action. p. 28.
4. *ASSIGNMENTS.—Contracts.—Personal Confidence.*—An answer in a foreclosure action that the mortgagee had agreed to dismiss the action upon the satisfaction of certain liens by the mortgagor, and that the agreement had been assigned to the defendant, was demurrable, in view of the rule that rights arising out of a contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence, such that the party conferring the rights intended that they should be exercised only by the party in whom the confidence was placed. p. 27.
5. *APPEAL.—Record.—Conclusiveness.*—The appellant's contention that his cross-complaint stands unchallenged because no demurrer was ever filed thereto is of no avail on appeal where a recital in the transcript shows that a demurrer was filed and sustained, even though the demurrer is not shown, since such recital must be accepted as true. p. 28.
6. *APPEAL.—Review.—Demurrer.*—The court on appeal may look beyond the memorandum filed with a demurrer, as required by Acts 1911 p. 415, §344 Burns 1914, to uphold the ruling of the trial court in sustaining the demurrer. p. 28.
7. *APPEAL.—Review.—Presumptions.*—In the absence of an affirmative showing of error, the court on appeal may indulge a

Nelson v. Reidelbach, Exr.—68 Ind. App. 19.

presumption in favor of the correctness of the rulings of the trial court. p. 29.

From Cass Circuit Court; *James P. Wason*, Judge.

Action by Louis Reidelbach and others against James Nelson and others. From a judgment for the plaintiffs, the defendants appeal. *Affirmed*.

Palmer & Carr, McConnell, Jenkines & Jenkines, for appellants.

Joseph M. Rabb, M. F. Mahoney, M. L. Fansler and Sills & Sills for appellees.

BATMAN, J.—This action was commenced by Edward Weaver against appellants Nelson and Nelson and others. Appellant Ferguson was afterwards made a party defendant. Edward Weaver subsequently died, and appellee was substituted as plaintiff in his stead. The cause was tried on an amended complaint in two paragraphs. By the first paragraph appellee sought a judgment on a certain note of \$2,500, executed by appellants Nelson and Nelson, and a decree foreclosing a mortgage on certain real estate given to secure the same. By the second paragraph appellee sought a judgment on a certain note of \$400, executed by appellant James Nelson, and a decree foreclosing a purchase-money lien therefor on the same real estate. Each paragraph alleged that appellant John H. Ferguson was claiming an interest in said real estate; that his interest, if any, was inferior and subordinate to appellee's said liens; and that said appellant was made a defendant to answer as to any interest he had therein. A demurrer was filed to this complaint, and afterwards overruled, but the demurrer itself is not shown in the transcript. Appellants Nelson and Nelson filed an answer in

Nelson v. Reidelbach, Exr.—68 Ind. App. 19.

abatement to which a demurrer was sustained. They subsequently filed an amended answer in abatement, in which they alleged in substance that during the life of appellee's decedent, while this action was pending in his name, said decedent and appellant James Nelson, acting for himself and his wife, entered into the following written agreement:

"This agreement made and entered into by Edward Weaver, of Winamac, Indiana, and James Nelson of Monticello, Indiana, this 5th day of September, 1914, witnesseth,

"That, whereas, the said Edward Weaver has commenced proceedings of foreclosure of a mortgage and action for \$400.00 in money as against said James Nelson et al in the White Circuit Court of Indiana, and is there pending for action in the September Term of said court. Now, therefore, the said Edward Weaver, in consideration of the acts and performances on the part of the said Nelson, hereinafter set forth, said Weaver does hereby agree to defer and postpone further action upon said foreclosure procedure and said suit for \$400.00 until said Nelson shall have paid to one J. D. Timmons, a sum of money in satisfaction of a tax lien, and pay to George Connell a sum of money in satisfaction of a sheriff's sale, all of which is a lien upon said real estate described in said foreclosure.

"Said Weaver does hereby agree that when said Nelson shall have satisfied said J. D. Timmons and George Connell and said liens held by them released, that he, Weaver, shall accept, and said Nelson hereby agrees to execute to said Weaver, a new mortgage on said real estate

named in said foreclosure proceedings. Said mortgage to be in the amount of the principal of the amount of the mortgage now held by him plus the \$400.00 evidenced by a promissory note held by said Weaver, said mortgage to extend to the time when said original mortgage extended and at the rate of interest therein named. When said new mortgage is so executed said Weaver shall dismiss such proceedings now pending in relation to said real estate herein involved.

“In witness whereof the parties hereunto have set their hands and seals the date and year above mentioned.

“Edward Weaver,

“James Nelson.”

It is further alleged that appellants Nelson and Nelson had paid said Timmons the full amount of his said tax lien, and secured the cancellation thereof; that they had paid the said Connell the amount required to fully satisfy his sheriff's certificate, and had secured the surrender and cancellation of the same; that they had executed and tendered to appellee a new mortgage on the real estate named in said agreement, according to the provisions thereof, for the amount provided therein and had performed all the things by them to be performed by the terms thereof; that appellee refused to accept said mortgage and notified them that he would accept nothing less than the payment of the full amount due upon the two promissory notes in suit, and that it was not necessary to make, and he would not require, a formal tender of said new mortgage or the interest due on said indebtedness. To this answer in abatement appellee filed a demurrer for want of facts, which was sustained.

Nelson v. Reidelbach, Exr.—68 Ind. App. 19.

On January 12, 1916, appellant Ferguson filed an answer in abatement, which contained substantially the same averments as the answer in abatement of appellants Nelson and Nelson with reference to the pendency of this action in the name of appellee's decedent and the execution of the contract set out therein, between said James Nelson, on behalf of himself and wife, and appellee's decedent. It is then alleged that after the execution of said agreement, to wit, on January 23, 1915, the said Nelson and Nelson, who are husband and wife, conveyed said mortgaged real estate to him for a valuable consideration by general warranty deed, subject to all the incumbrances on the same, and put him in possession thereof and that since said date he has been, and now is, the *bona fide* owner of the same in fee simple; that at the time the said Nelson and Nelson conveyed said real estate to him, they executed to him for a valuable consideration the following written assignment of said contract:

“For value received I hereby assign the within contract and all my rights thereto to John H. Ferguson. Dated this 23rd day of January, 1915.

“James Nelson.”

It is further alleged that he had paid said Timmons the full amount of his said tax lien, and had secured the cancellation thereof; that he had paid the said Connell the amount required to fully satisfy his sheriff's certificate, and had secured the surrender and cancellation of the same; that he had executed and tendered to appellee a new mortgage on the real estate named in said agreement, according to the provisions thereof, for the amount provided therein, and

he and appellants Nelson and Nelson have done and performed each and all of the requirements of said agreement on their part to be performed; that appellee refused to accept said mortgage, and notified him that he would accept nothing less than the payment of the full amount due upon the two notes in suit and that it was not necessary to make, and he would not require, a formal tender of said new mortgage or the interest due on said indebtedness; that he (Ferguson) was worth, over and above all debts and liabilities, in property subject to execution at the time said contract was executed, more than the sum of \$20,000. On February 1, 1916, a demurrer was filed to this answer, and afterwards sustained, but the demurrer itself is not shown in the transcript.

On April 3, 1916, appellant Ferguson filed an answer to appellee's complaint in three paragraphs, the first being a general denial and the second a plea of payment. The third is in all material respects the same as his answer in abatement, with the additional averment that he now brings into court the said new mortgage and the accrued interest on the notes in suit for the use and benefit of appellee, and that by reason of the facts alleged appellee's rights under the notes and mortgage in suit have been compromised and settled, and this cause should be dismissed. Appellee filed a demurrer to said third paragraph of answer, which does not appear to have been ruled upon. Appellant Ferguson subsequently filed a fourth paragraph of answer in which he alleged that he purchased the real estate described in the second paragraph of complaint and paid a valuable consideration therefor, without any knowledge or notice at the time of the purchase and conveyance to him of the

Nelson v. Reidelbach, Exr.—68 Ind. App. 19.

outstanding promissory note of his coappellants in the sum of \$500.

On April 13, 1916, appellant Ferguson filed his cross-complaint, which in all material respects is the same as his third paragraph of answer to the complaint. Prayer that the cause be dismissed at the cost of appellee, and for all other proper relief. On the following day appellee filed a demurrer to said cross-complaint, but it is not shown by the transcript. This demurrer was subsequently sustained.

Appellants Nelson and Nelson filed an answer to appellee's second paragraph of complaint in two paragraphs; the first being a general denial and the second a plea of payment. Appellee then closed the issues by filing certain replies. The cause was submitted to the court for trial, and judgment was rendered in favor of appellee, against appellants Nelson and Nelson on the notes in suit for \$3,809.25 and costs, and a decree was entered foreclosing the liens securing the same. Appellants filed motions for a new trial, which were overruled and now prosecute this appeal.

Appellants' assigned errors Nos. 1, 8, 12, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, and 31 relate to the sufficiency of the complaint, and

1. are waived by a failure to state any propositions or points with reference to the same.

Chesapeake, etc., R. Co. v. Jordan (1916), 63

2. Ind. App. 365, 114 N. E. 461; *Continental Ins.*

Co. v. Bair (1917), 65 Ind. App. 502, 114 N. E.

763, 116 N. E. 752. Moreover, Nos. 17, 18, 19, 20, 22, 25, 26, 29, 30, and 31 would not be available in any event, as they seek in this court to assail the complaint on the ground of insufficient facts by a direct

assignment in that regard. Since the amendment of §348 Burns 1908 (Acts 1911 p. 415) there has been no authority for such procedure. *Riley v. First Trust Co., Admr.* (1917), 65 Ind. 577, 117 N. E. 675.

Appellants' assigned errors Nos. 2, 3, 4, 9, 10, 13 and 14 relate to the action of the court in sustaining demurrers to their answers in abatement. It

3. will be noted that these answers are each based on a collateral written agreement between appellee's decedent and appellant James Nelson, which provides for a stay of further proceedings in this action until said Nelson shall have secured the satisfaction of certain liens on the real estate in question, after which a new mortgage was to be executed thereon by said Nelson and accepted by said decedent to secure certain indebtedness due him, and thereupon this cause was to be dismissed. Appellee contends that this agreement is invalid, and therefore could not serve as the basis of a plea in abatement. This contention need not be considered, as the answers are subject to demurrer for other reasons. It is alleged in each that the liens mentioned in the agreement have been satisfied. This was the event to which this action was to be postponed by the terms of the agreement. The fact that appellee refused to carry out its provisions relating to the settlement of the notes in suit and the dismissal of this action are clearly not matters in abatement. The indebtedness was due, the event limiting the postponement of the action had transpired, even if the agreement was valid, and hence no ground existed for an abatement of the action. It follows that the court did not err in sustaining demurrers to said answers.

Appellants' assigned errors Nos. 5 and 15 relate

to the action of the court in sustaining a demurrer to the cross-complaint of appellant John H.

4. Ferguson. It will be noted that this cross-complaint and the third paragraph of answer in bar of said appellant are substantially the same in their material averments. They each show that the new mortgage on the real estate involved was to be executed by said Nelson, but contain no averment that any such mortgage had been executed and tendered by him. They allege that the real estate was conveyed, and said contract was assigned by said Nelson, to appellant Ferguson, and that he executed and tendered a new mortgage on said real estate in accordance with the provisions of said agreement. These facts of themselves would render each of said pleadings insufficient. It is a general rule that rights arising out of a contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence, such that the party whose agreement conferred the rights must have intended them to be exercised only by him in whom he actually confided. 4 Cyc 22; Pollock, Principles of Contracts (6th ed.) 454; *Campbell v. Sumner County* (1902), 64 Kan. 376, 67 Pac. 866; *Tifton, etc., R. Co. v. Bedgood & Co.* (1902), 116 Ga. 945, 43 S. E. 257; *Edison v. Babka* (1896), 111 Mich. 235, 69 N. W. 499; *King v. Batterson* (1880), 13 R. I. 117, 43 Am. Rep. 13; *Hardy Implement Co. v. Iron Works* (1895), 129 Mo. 222, 31 S. W. 599; *Schlessinger v. Forest Products Co.* (1909), 78 N. J. Law 637, 138 Am. St. 627. Where a party's estimate of the solvency and pecuniary credit and standing of the one with whom he is dealing may have constituted an important inducement to him in making a contract, an assignment of the same will not

be upheld. *Sprankle v. Truelove* (1899), 22 Ind. App. 577, 54 N. E. 461; *Sargent Glass Co. v. Matthews Land Co.* (1904), 35 Ind. App. 45, 72 N. E. 474; *Lansden v. McCarthy* (1869), 45 Mo. 106. In the instant case appellee's decedent, in entering into the agreement in question, may have taken into account, not only the value of the land on which the new mortgage was to be executed and the financial ability of the party with whom he was contracting, but also his general reputation for fair dealing, industry, sobriety and thrift. The latter fact may have constituted a material inducement for entering into the contract. To illustrate: the debt to be secured by the new mortgage may have been near the value of the land on which it was to be executed, and appellee's decedent, in agreeing to accept the new mortgage of James Nelson, may have reposed confidence in his personal qualities, and by reason of such fact may have been willing to forego the immediate collection of his indebtedness, and to extend the time for the payment thereof over a period of years, by accepting a new mortgage executed by him, while he would have refused to enter into a similar arrangement with another. We believe the rule stated is clearly applicable to the facts alleged in the cross-complaint of appellant Ferguson, and for that reason the court did not err in sustaining appellee's demurrer thereto.

But appellants contend that the entry showing the sustaining of a demurrer to the separate answer in abatement of appellant Ferguson is a nullity,

5. as there was no demurrer pending at the time the ruling was made; and that by reason of this fact said answer stands unchallenged, and he
6. was entitled to a trial on the issue thus made before being required to answer in bar. We

Nelson v. Reidelbach, Exr.—68 Ind. App. 19.

cannot sustain this contention. The record

7. discloses that this answer in abatement was filed on January 12, 1916, and that a demurrer thereto was filed on February 1, 1916. The demurrer is not shown in the transcript, but it appears to have been sustained on March 20, 1916. Appellants also claim that the entry showing the sustaining of a demurrer to the cross-complaint of appellant Ferguson is a nullity, as no such demurrer was ever filed and therefore this cross-complaint stands unchallenged and the court erred in ignoring the same on the trial of the cause. This contention is not tenable. The record shows that this cross-complaint was filed on April 13, 1916, and that a demurrer thereto was filed on April 14, 1916, and was sustained on May 1, 1916. True, the demurrer itself is not shown, but the recital of the transcript as to its filing must be accepted. The fact that the record does not disclose the filing of a memorandum with either of said demurrers, in compliance with §344 Burns 1914, Acts 1911 p. 415, does not render the ruling thereon reversible error, as the court may look beyond a memorandum, or any grounds stated therein, to uphold the action of a trial court in sustaining a demurrer. *Grand Rapids, etc., R. Co. v. Jaqua* (1917), 66 Ind. App. 113, 115 N. E. 73, and authorities there cited. Moreover, since the record discloses that demurrers were filed and sustained to the answer in abatement and the cross-complaint of appellant Ferguson, and it does not affirmatively appear that the trial court actually committed error in so doing, we would be authorized to indulge a presumption in favor of the correctness of such rulings. *Eastman v. Smith* (1914), 56 Ind. App. 621, 105 N. E. 64. We may add that, inasmuch as we have held that

Koons v. Burkhart—68 Ind. App. 80.

both the answer in abatement and the cross-complaint are insufficient, nothing could be gained in any event by a reversal in order to give appellant a chance to introduce evidence thereon, when it is apparent that they are not only insufficient, but could not be made sufficient by amendment.

Appellant's assigned errors Nos. 6, 7, 11 and 16 relate to the action of the court in overruling appellants' motion for a new trial, but are waived

1. by a failure to state any proposition or point with reference to the same.

We find no reversible error in the record. Judgment affirmed.

NOTE.—Reported in 119 N. E. 804.

KOONS ET AL. v. BURKHART.

[No. 9,561. Filed June 6, 1918.]

1. **DEEDS.—Validity.—Delivery.**—A deed, otherwise properly executed, is ineffectual to convey title until it has been either actually or constructively delivered. p. 33.
2. **DEEDS.—Time of Delivery.—Presumption.**—Where a document purported to be a duly acknowledged deed, with regular evidence of its execution upon its face, is found in the hands of the grantee, or found upon the proper records, a presumption arises that it was delivered at the time of its date, or at some time prior to the date of its recording, which presumption is sufficient to make out a *prima facie* case of delivery. p. 34.
3. **DEEDS.—Description.—Construction.**—Descriptions in deeds are construed with the utmost liberality, and the intent of the parties, if it can by any possibility be gathered from the language employed, will be effectuated. p. 34.
4. **EVIDENCE.—Parol Evidence.—Description in Deed.**—Where the description given in a deed is consistent but incomplete, and its completion does not require the contradiction or alteration of that

Koons v. Burkhart—68 Ind. App. 30.

given, nor that a new description should be introduced, parol evidence may be received to complete the description and identify the property. p. 34.

5. EVIDENCE.—*Parol Evidence.*—*Construction of Deeds.*—Extraneous and parol evidence is competent to apply the terms of a deed to the subject-matter. p. 35.
6. DEEDS.—*Description.*—*Construction.*—Where the description in a deed is consistent but incomplete, it is proper to read the deed in the light of surrounding circumstances at the time the deed was made. p. 35.
7. DEEDS.—*Construction.*—*Description.*—*Boundaries.*—Where a deed specifies a certain number of acres to be taken off of a certain side of a larger tract of land, it will be construed to mean that parallel lines shall fix the boundaries, though they are not mentioned. p. 35.
8. DEEDS.—*Description.*—*Construction.*—*Parol Evidence.*—Where a deed conveyed all of grantor's land, described as "The east half of the northwest quarter of the southwest quarter of section 34 in township 8 north of range 2 west, containing twenty (20) acres more or less, also sixty (60) acres of the east of the eighty (80) running north and south leaving twenty (20) acres on the west," the description of the sixty acres came within the rule that parol evidence was admissible to apply such description to the subject-matter, so that the conveyance was not void for uncertainty where there was sufficient evidence, in an action to quiet title to such tract, to warrant the trial court in finding that the sixty acres involved was the land intended to be conveyed by the deed. p. 35.
9. APPEAL.—*Review.*—*Judgment.*—*Failure to File Motion to Modify.*—In an action to quiet title, where the judgment was valid as to part of the land involved, the judgment for that reason must stand in the absence of a motion to modify. p. 37.

From Monroe Circuit Court; *Robert W. Miers*, Judge

Action by Florence Burkhart against Milford G. Koons and others. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

Batman, Miller & Blair and *East & East*, for appellants.

James B. Wilson, for appellee.

IBACH, J.—This is a suit by appellee to quiet her title to a certain tract of real estate and for the partition of another tract. The controversy and the questions presented on this appeal relate solely to the first tract, and our discussion will be so confined.

The first paragraph of complaint is in the ordinary form of a suit to quiet title, and the land is therein described as follows:

“The following real estate situate in the county of Monroe and state of Indiana, to wit: The east half of the northwest quarter of the southwest quarter of section thirty-four (34) in township eight (8) north, in range two (2) west, also sixty acres bounded by parallel lines on the east end of the south half of the southwest quarter of section 34, township 8 north, range 2 west.”

The second paragraph of complaint describes the same land described in the first paragraph, sets out the relationship of the parties, alleges that on November 10, 1900, the grantor was the owner of the land described; that on said date he executed the conveyance in question and put appellee in possession of the land; that ever since that date she has been in possession of the real estate, and has made valuable improvements thereon and paid all taxes; that by mutual mistake of the parties the said land was described in the deed as follows:

“The following real estate in Monroe county, in the state of Indiana, to-wit: The east half of the northwest quarter of the southwest quarter of section 34 in township 8 north of range 2 west, containing (20) acres more or less. *Also sixty (60) acres of the east of the eighty (80) running*

north and south leaving twenty (20) acres on the west.” (Our italics.)

In this paragraph appellee asks that the deed be reformed and her title quieted. A general denial closed the issues. A trial by the court resulted in a general finding that appellee was the owner of the land described in her complaint and entitled to a decree quieting her title thereto. Judgment was rendered accordingly.

The error here relied on is the overruling of the appellants' separate motion for a new trial.

Appellants contend: (1) That there is an entire absence of legal evidence to support the finding, and therefore the finding is contrary to law. (2) The description of the sixty-acre tract, in the deed in suit, is void for uncertainty, and conveys no title to said real estate. (3) There was no proof of the delivery of the deed.

We will consider these contentions in their inverse order. At the trial appellee produced and read in evidence a duly acknowledged deed signed by Eli Koons, by which deed the land in dispute is purported to have been conveyed to appellee on November 10, 1900. Eli Koons, the grantor, died in August, 1904. There was no further evidence one way or the other of the delivery of the deed. Whether or not it was delivered to appellee by her father in his lifetime is left wholly to inference, and depends upon the presumptions which obtain upon the facts as they appear.

It is elementary that a deed, otherwise prop-

1. erly executed, is ineffectual to convey title until it has been either actually or constructively delivered.

“The rule is well established that where a docu-
VOL. 68—3.

ment purporting to be a duly acknowledged deed, with regular evidence of its execution upon its

2. face, is found in the hands of the grantee, or if such a deed is found upon the proper records, a presumption arises that it was delivered at the time it bears date, or at some time prior to the date of its recording." *Scobey v. Walker* (1888), 114 Ind. 254, 257, 15 N. E. 674, 676, and cases cited; *Vaughan v. Godman* (1884), 94 Ind. 191; *Squires v. Summers* (1882), 85 Ind. 252; *Deeter v. Burk* (1915), 59 Ind. App. 449, 107 N. E. 304. These presumptions, although rebuttable, were sufficient to make out a *prima facie* case of delivery.

The following principles of law are pertinent to appellants' second contention, *supra*:

"The general rule in regard to the construction of the description of the premises in a deed is one of the utmost liberality. The intent of the parties, if

3. it can by any possibility be gathered from the language employed, will be effectuated." *Peck v. Mallams* (1853), 10 N. Y. 509, 532; *Warner v. Marshall* (1905), 166 Ind. 88, 107, 75 N. E. 582, 587. "It is not the office of a description to identify the land, but to furnish the means of identification." *Warner v. Marshall*, *supra*, and cases cited.

A rule often recognized in this state is that, where the description given in a deed is consistent but incomplete, and its completion does not require

4. the contradiction or alteration of that given, nor that a new description should be introduced, parol evidence may be received to complete the description and identify the property. *Tewksbury v. Howard* (1894), 138 Ind. 103, 106, 37 N. E. 355; *Indiana Central Canal Co. v. State* (1876), 53 Ind. 575, 591.

“It is thoroughly settled that extraneous and
 5. parol evidence is competent to apply the terms of a deed to the subject-matter.” *Warner v. Marshall, supra; Elsea v. Adkins* (1904), 164 Ind. 580, 582, 74 N. E. 242, 108 Am. St. 320, and cases cited.

Where the description in a deed is consistent but incomplete, it is proper to read the deed in the light of surrounding circumstances at the time the
 6. deed was made. *Scheible v. Slagle* (1883), 89 Ind. 323, 330; *Dawson v. James* (1878), 64 Ind. 162. In the case last cited it is said: “The descriptive part of a deed is to be construed with reference to the actual state of the property conveyed by it at the time of its execution, and the parties are supposed to refer to this for a definition of the terms made use of in the deed.” See, also, *New England, etc., Wool Co. v. Standard Worsted Co.* (1896), 165 Mass. 328, 332, 43 N. E. 112, 52 Am. St. 516.

Where a deed specifies a certain number of acres to be taken off of a certain side of a larger tract of land, it will be construed to mean that parallel lines
 7. shall fix the boundaries without mentioning them. *Collins v. Dresslar* (1892), 133 Ind. 290, 293, 32 N. E. 883.

The principles are clear, but their application to a particular description is not always free from difficulty. The averments of the second paragraph
 8. of complaint that appellee’s father, the grantor, was on November 10, 1900, the owner of the property described in the complaint; that on that date he executed the deed in controversy, and then and there put appellee in possession of the said real estate; that ever since that date she has been in

possession thereof, and has made valuable improvements thereon and paid all taxes thereon, are amply supported by the evidence, which also shows that at the time of this transfer the grantor owned no other property.

It is not claimed by appellants that the description of the first twenty acres described in the deed is uncertain. With the twenty-acre tract out of the way, the only land left was the eighty-acre tract described in the complaint. The grantor owned no other land. Therefore the language of the deed, "the eighty" must necessarily have referred to the eighty acres in question, and that which was uncertain is made certain. The application of the remainder of the description, viz., "Sixty acres of the east of the 80 acres running north and south leaving 20 acres on the west," is not difficult. This would require but an additional line run across the eighty-acre tract parallel with and far enough west of the east line to contain sixty acres.

We conclude that the description of the sixty acres comes within the rule announced *supra*, and parol evidence was admissible to apply the description to the subject-matter, and the introduction of parol evidence made the question of identification one of fact for the trial court. *Symmes v. Brown* (1859), 13 Ind. 318, 321; *Warner v. Marshall*, *supra*.

There was evidence from which the court was warranted in finding that the land to which appellee sought to have her title quieted was the land intended to be conveyed by the deed.

Other questions relating to the right of reformation are not of controlling importance in view of the conclusions reached.

Raynes v. Staats-Raynes Co.—68 Ind. App. 37.

In any event, the judgment was valid as to the twenty acres, and for that reason, if no other, the judgment must stand in the absence of a mo-

9. tion to modify. *Millikan v. McAlpin* (1913), 181 Ind. 482, 483, 104 N. E. 855; *Guyenn v. Wabash, etc., Trust Co.* (1912), 53 Ind. App. 391, 396, 101 N. E. 738; *Elijah v. Dowling* (1911), 49 Ind. App. 515, 519, 97 N. E. 551; *People's Sav., etc., Assn. v. Spears* (1888), 115 Ind. 297, 300, 17 N. E. 570.

Judgment affirmed. Batman, J., not participating.

NOTE.—Reported in 119 N. E. 820. See under (1) 18 C. J. 196; (2) 18 C. J. 414; (5) 18 C. J. 277.

RAYNES v. STAATS-RAYNES COMPANY.

[No. 10,245. Filed June 6, 1918.]

1. MASTER AND SERVANT.—*Workmen's Compensation Act.—Appeals.—Record.—Failure to Include Evidence.*—On an appeal from a finding of the Industrial Board, no question depending upon the evidence for its correct determination can be considered where the evidence is not in the record. p. 39.
2. MASTER AND SERVANT.—*Workmen's Compensation Act.—Legal Conclusions.—Accident Arising Out of Employment.*—The determination of the question whether an accident arose out of the employment within the meaning of the Workmen's Compensation Act, Acts 1915 p. 392, is in the nature of a legal conclusion. p. 40.
3. MASTER AND SERVANT.—*Workmen's Compensation Act.—Failure to Find.—Effect.*—A finding in a proceeding under the Workmen's Compensation Act, Acts 1915 p. 392, need not affirmatively show a lack of evidence or an inability to find, the failure to find being alone equivalent to a finding against the party on whom the burden of proof rests. p. 40.
4. MASTER AND SERVANT.—*Workmen's Compensation Act.—Appeals.—Burden of Showing Error.*—On an appeal from a finding in a proceedings under the Workmen's Compensation Act, Acts 1915 p. 392, it is the appellant's duty to bring to the court a record

Raynes v. Staats-Raynes Co.—68 Ind. App. 37.

which affirmatively shows reversible error, and this requirement is not satisfied by a mere finding containing only evidentiary facts susceptible of two inferences. p. 41.

5. MASTER AND SERVANT.—*Workmen's Compensation Act.—Findings of Industrial Board.—Conclusions.*—In a proceedings under the Workmen's Compensation Act, Acts 1915 p. 392, the inferences drawn from the evidence by the Industrial Board are conclusive on appeal in the absence of the evidence from the record. p. 42.

6. MASTER AND SERVANT.—*Workmen's Compensation Act.—Appeals.—Presenting Questions for Review.—Sufficiency of Evidence.*—On an appeal from a finding in a proceedings under the Workmen's Compensation Act, Acts 1915 p. 392, a finding of facts, though evidentiary in character, cannot take the place of the evidence to make effective a challenge of the sufficiency of the evidence. p. 42.

From the Industrial Board of Indiana.

Proceedings for compensation under the Workmen's Compensation Act by Burt F. Raynes against the Staats-Raynes Company. From a denial of an award, the applicant appeals. *Affirmed.*

Foley, O'Mara & Roach, for appellant.

A. E. Schmollinger and Taylor, White & Wright, for appellee.

HOTTEL, J.—This is an appeal from the action of the full Industrial Board denying appellant's application for compensation for personal injuries alleged to have been received by him December 26, 1916.

The case is one which has been before the court on a statement of facts certified to it by said Industrial Board. The opinion then rendered on the question of law so presented was filed December 21, 1917. *In re Raynes* (1917), 66 Ind. App. 321, 118 N. E. 387.

The record brought to this court in this appeal sets out the statement of facts which it says were certified to this court "in connection with this cause." It also appears from the record that such statement was

so certified after a full hearing by said board and while the case was being held under advisement. The record then shows that on January 15, 1918, the full board made the following finding and award. Then follows another entry, which shows, among other things, the following, viz.: And the full board heard additional evidence and took said cause under advisement. This is followed by a finding of facts by the board, which, in all material respects, is substantially the same as the statement of facts upon which the case was certified to this court, except the last finding of the board contains an additional statement as follows: "The evidence does not show, and the full board cannot find therefrom that the injury of the plaintiff resulted from an accident arising out of his employment."

Upon the facts so found, the board concluded and ordered that the appellant take nothing, and that he pay the costs of the proceeding. From this order appellant appeals and assigns as error that "the award of the full board is contrary to law."

The appellant has not brought to this court, in this appeal, the additional evidence heard by said board at its hearing had after the rendition of said opinion.

1. Indeed, the record in the present appeal contains none of the evidence offered in the case at any hearing of said board. It follows that no question, depending for its correct determination upon the evidence, can be considered. *Rose v. Chicago, etc., R. Co.* (1913), 181 Ind. 658, 105 N. E. 241; *Newman v. Horner* (1913), 55 Ind. App. 298, 103 N. E. 820; *McCray v. Whitney* (1913), 56 Ind. App. 94, 104 N. E. 979.

It is appellant's contention that the additional

statement contained in the present finding of the board, which we have quoted *supra*, is a conclusion of law and adds nothing to the finding.

It is true, as appellant contends, that the question whether an accident arose out of the employment is in the nature of a legal conclusion. This ques-

2. tion had consideration by this court in the cases of *Columbia School Supply Co. v. Lewis* (1916), 63 Ind. App. 386, 115 N. E. 103, and *Zeitlow v. Smock* (1917), 65 Ind. App. 643, 117 N. E. 665. See, also, cases there cited. These cases expressly hold that the questions whether an injury resulted from accident, and whether it arose out of the employment, in their last analysis, involved a legal conclusion. It is true that the statement here involved contains the additional words "the evidence does not show," but this, if it be given its full import, could mean no more than that there was no evidence on said issue, and hence is the equivalent of a failure

to find upon such issue and adds nothing to the
3. other facts expressly found. A finding need not affirmatively show a lack of evidence or an inability to find. The failure to find alone is equivalent to a finding against the party on whom the burden of proof rests. It follows that the additional finding or statement quoted *supra* adds nothing to said finding, but it does not follow that there must be a reversal of the award in this case.

We have said *supra* that the remainder of the present finding is substantially, if not identically, the same as the certified statement of facts upon which the former opinion of this court was rendered. Among the questions then submitted for the court's determination was the question, "Did the accident arise out

of his employment?" As affecting such question and the other questions then submitted, this court said: "The certified statement contains a number of evidentiary facts from which the board has not deduced the ultimate facts essential to a direct answer to these questions."

The court, in its opinion, then indicates the ultimate facts essential to a determination of said questions, and continues: "These are questions of ultimate fact which it is the province of the board rather than this court to deduce. In the one case it is our judgment that the accident arose out of and in the course of the employment * * * in the other case our judgment is otherwise."

The ultimate facts indicated in said opinion as essential are not supplied by the present finding of facts, but, on the contrary, only the evidentiary facts indicated in our former opinion are contained in said finding of facts, and hence there is a failure to find said essential facts. This, as before indicated, is the equivalent of a finding against the party who has the burden of the issue upon which the finding is silent, or lacking in the ultimate facts essential to its support.

The burden in this case was upon the appellant. *Haskell, etc., Car Co. v. Brown* (1918), 67 Ind. App. 178, 117 N. E. 555, and cases there cited. It

4. was his duty to bring to the court a record which affirmatively shows reversible error. This required him, as affecting the questions which he seeks to present by his appeal, to bring to the court a finding of facts which affirmatively shows ultimate facts, admitting of but one conclusion, viz., a conclusion favorable to him. *Fairbanks v. Warrum*

Raynes v. Staats-Raynes Co.—68 Ind. App. 37.

(1913), 56 Ind. App. 337, 344, 104 N. E. 983; *Graves v. Jenkins* (1914), 58 Ind. App. 500, 502, 108 N. E. 531; *Gary, etc., R. Co. v. Hacker* (1914), 58 Ind. App. 618, 108 N. E. 756. Instead, he brings to the court, and asks a reversal on, a finding containing only evidentiary facts, which this court has before held to be susceptible of either of two inferences, which it was the province of the Industrial Board, rather than this court, to draw. Such board, by its award, has

5. drawn said inferences against appellant, and by its inferences, in the absence of the evidence, this court is bound. If the appellant was of the opinion that the inferences drawn by said board were not warranted by the evidence, he should have challenged its sufficiency and brought it to this

6. court for review. A finding of facts, though evidentiary in character, cannot take the place of the evidence to make effective a challenge of the sufficiency of the evidence.

The award of the Industrial Board is affirmed.

NOTE.—Reported in 119 N. E. 809. Conclusiveness of findings as to what constitutes an accident or injury within the meaning of Workmen's Compensation Act, L. R. A. 1918F 877. Conclusiveness of findings as to whether injury was one "arising out of and in the course of" the employment, L. R. A. 1918F 915.

NATIONAL COUNCIL OF THE KNIGHTS AND LADIES OF
SECURITY v. SIMS.

[No. 9,627. Filed June 6, 1918.]

1. **APPEAL.—Briefs.—Sufficiency.—Abstract Propositions of Law.—Waiver of Error.**—Where appellant's brief, under its points and authorities, set forth a number of general statements of facts and abstract propositions of law, but made no reference to the motion for a new trial, nor were such propositions of law specifically applied to any alleged error relied on for reversal, no question is presented for review and any error is waived. p. 45.
2. **INSURANCE.—Dues and Assessments.—Time of Payment.—Waiver.**—Although a provision in a benefit certificate of insurance limited the time in which dues and assessments might be paid, such provision could be waived by the local agent giving permission to pay them a few days late and thereafter so receiving them for several years. p. 46.

From Clay Circuit Court; *John M. Rawley*, Judge.

Action by Jennie Sims against the National Council of the Knights and Ladies of Security. From a judgment for plaintiff, the defendant appeals. *Affirmed*.

Arthur W. Fulton and *Luther & Luther*, for appellant.

W. Stilwell, *F. S. Rawley* and *McGregor*, *Knight & Miller*, for appellee.

FELT, J.—Appellee brought this suit to recover as beneficiary on a certificate or policy of insurance alleged to have been issued to her husband, William C. Sims, in his lifetime by appellant.

The complaint is in two paragraphs. The first paragraph was drawn on the theory that appellee and her deceased husband had fully complied with all the provisions of the contract of insurance, and that the same was in full force and effect at the time of the

death of her husband on August 1, 1914. The second paragraph alleges that certain provisions of the written contract of insurance were not fully complied with by the insured in his lifetime, in this, that the dues and assessments which by the terms of his policy were to be paid on or before the last day of each month were not paid within such period, but were paid within the first five days of the succeeding month; "that by the custom of said defendant with its agent, the said William C. Sims and other members were not required to pay their dues or assessments during the month in which they became due, but on the contrary were permitted to pay the same within five days after the expiration of the month in which the same fell due"; that such custom existed for more than two years prior to the death of appellee's said husband, during which time he paid his dues and assessments in accordance with such custom, and the same were accepted by appellant; that thereby said Sims was led to believe and did believe that, in order to keep alive the said certificate or policy, it was not necessary to pay his dues and assessments during the month in which they became due; that he relied upon such custom, and all dues and assessments due from him at the time of his death had been fully paid in accordance therewith.

The complaint was answered by a general denial and by a special paragraph of answer, in which it was averred in substance that, under the constitution and by-laws of appellant, any member had the right to pay his monthly assessments within sixty days from the time the same became due, provided he was in good health, and thereby reinstate himself from suspension of his membership for nonpayment of his

dues or assessments, on or before the last day of the month; that payments made in pursuance of such provisions did not establish a custom contrary to the provisions of the insurance contract.

To the special answer a reply in general denial was filed. A trial by the court resulted in a finding and judgment in appellee's favor in the sum of \$2,024.

The only error relied on for reversal is the overruling of appellant's motion for a new trial.

Appellant, under its points and authorities, in its briefs has set forth a number of general statements of facts, and abstract propositions of law, but

1. no reference is made to the motion for a new trial, and we can only know by inference that the same arise thereunder, or are in any way related thereto. The propositions of law so stated are not specially applied to any alleged error relied on for reversal. Under the repeated decisions of the Supreme Court and this court, appellant has waived any error, and the judgment of the lower court should be affirmed. *Chicago, etc., R. Co. v. Dinius* (1913), 180 Ind. 596, 626, 103 N. E. 652; *White v. State, ex rel.* (1915), 183 Ind. 649, 655, 109 N. E. 905, Ann. Cas. 1917B 527; *Palmer v. Beall* (1915), 60 Ind. App. 208, 110 N. E. 218; *Rook v. Straus Bros. Co.* (1915), 60 Ind. App. 381, 382, 110 N. E. 1006.

However, we have read all the briefs, and as far as possible have sought to ascertain the controlling questions involved in the case, and are convinced that even upon the merits of the case, the record fails to present any error which would justify the court in reversing the judgment.

The wife of the deceased, the beneficiary under the policy was permitted to testify, over appellant's objec-

tion, to making payments of dues and assessments for her husband, on the certificate involved in this suit, after the expiration of the month for which such dues were payable, and also that she made payments at the same time on a certificate or policy upon her own life. She also testified to a conversation with the local officer of appellant who collected the dues and assessments to the effect that she had asked if she and her husband might make payment of their dues and assessments for the preceding month on or about the third of the succeeding month, and that such agent had told her that it was all right to do so; that she reported such fact to her husband, and thereafter, for about two years prior to the death of her husband, they continued so to make payments, and the same were accepted by the local representative of appellant, without objection. The local agent also gave testimony to the same general effect.

Under the law applicable to the case, it was proper to make proof of such facts. The questions involved have been settled adversely to appellant's contentions. *Sovereign Camp, etc. v. Latham* (1915), 59 Ind. App. 290, 301, 107 N. E. 749; *Continental Ins. Co. v. Bair* (1917), 65 Ind. App. 502, 114 N. E. 763, 116 N. E. 752; *Indianapolis St. R. Co. v. Taylor* (1904), 164 Ind. 155, 72 N. E. 1045; 16 Cyc 1148, 1176; Gillett, Indirect and Collateral Ev. 291, 341, 349, 351, 352.

The case seems to have been fairly tried on its merits and a correct result reached. No intervening error prejudicial to any substantial right of appellant has been duly pointed out. §700 Burns 1914, §658 R. S. 1881; *Title Guaranty, etc., Co. v. State, ex rel.* (1915), 61 Ind. App. 268, 290, 109 N. E. 237, 111 N. E. 19;

Chicago, etc., R. Co. v. Van Stone—68 Ind. App. 47.

Bright Nat. Bank v. Hartman (1915), 61 Ind. App. 440, 453, 109 N. E. 846; *Kelso v. Cook* (1915), 184 Ind. 173, 203, 110 N. E. 987; *Breadheft v. Cleveland* (1915), 184 Ind. 130, 143, 108 N. E. 5, 110 N. E. 662.

Judgment affirmed.

NOTE.—Reported in 119 N. E. 834. See under (2) 29 Cyc 194, 195.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY v. VAN STONE.

[No. 9,611. Filed June 18, 1918.]

1. NEGLIGENCE.—*Damage to Personal Property.—Action.—Pleading.—Negativing Contributory Negligence.*—In an action to recover damages for injury to personal property, the complaint must negative contributory negligence. p. 50.
2. NEGLIGENCE.—*Damage to Personal Property.—Negligence of Agent.*—In an action for damages to plaintiff's automobile sustained in a collision on a railroad crossing while the machine was being driven by plaintiff's agent, the negligence of the driver, if any, was the negligence of plaintiff. p. 50.
3. RAILROADS.—*Crossing Accidents.—Action.—Complaint.—Contributory Negligence.*—The rule that a person approaching a railroad crossing is bound to see what he could have seen and to hear what he could have heard is only applicable where it appears that the person charged with the exercise of care is so situated that he could see the train in time to escape injury and there was no excuse for failure to see or hear, and a complaint, in an action for damages to an automobile in a crossing accident, alleging that the driver "slowed down and looked and listened," but could neither see nor hear the train, sufficiently negatives contributory negligence. pp. 50, 51.
4. RAILROADS.—*Crossing Accidents.—Negligence.—Contributory Negligence.—Presumptions.*—A person injured at a railway crossing by collision is not aided by a presumption of freedom from fault, nor is the railroad company aided by a presumption of contributory negligence. p. 51.
5. RAILROADS.—*Negligence.—Actions.—Defenses.—Operation by*

Chicago, etc., R. Co. v. Van Stone—68 Ind. App. 47.

Receiver.—Where an action is brought against a railroad company for damages based on negligence in operating its road, it is a sufficient defense to show that the road at such time was in the possession and control of a receiver who had exclusive charge of the employment and management of the agents and employes operating the railroad. p. 52.

6. *RAILROADS.—Negligence.—Action.—Defenses.—Operation of Road by Receiver.*—In an action for damages to property in a railroad crossing collision, alleged to be due to the negligent operation of its road by the railroad company, a mere showing that the road was being operated by receivers at the time of the accident is a sufficient defense, and it is unnecessary for defendant to prove that the receivers had qualified. p. 54.
7. *RAILROADS.—Negligence.—Action.—Defenses.—Pleading Receivership.*—In an action against a railroad company for damages to property in a crossing accident, alleged to be due to the negligent operation of the road, it is unnecessary to raise the defense that the road was being operated by receivers by special answer. p. 55.

From Knox Circuit Court; *Benjamin M. Willoughby*, Judge.

Action by Roxy M. Van Stone against the Chicago and Eastern Illinois Railroad Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

John E. Iglehart, Edwin Taylor, Eugene H. Iglehart and James W. Emison, for appellant.

Charles Unger and James M. House, for appellee.

BATMAN, J.—This is an action by appellee to recover damages on account of injuries to her automobile, alleged to have been caused by appellant in the operation of its passenger train in the city of Vincennes, Indiana. The complaint on which the cause was tried alleges, among other things, that appellant was a corporation, and for many years had been operating a railroad through said city on and over Eleventh street and its crossing with Buntin street,

Chicago, etc., R. Co. v. Van Stone—68, Ind. App. 47.

both being public thoroughfares in a thickly populated portion thereof; that on February 23, 1914, one Bailey, while in the employ of appellee and engaged in operating an automobile for her, was proceeding down Buntin street in a careful and prudent manner toward the crossing of said street, at a speed of about six miles per hour; that at said time a passenger train, owned and operated by appellant, was approaching the crossing at a speed of forty miles per hour, to the danger of the general public using the crossing; that said speed was greater than was reasonable and proper, and was in violation of an ordinance of said city restricting the speed of trains to ten miles per hour; that the agents and employees of appellant in charge of the train negligently and carelessly failed to look ahead or see the approaching automobile, and failed to ring any bell or give any warning of the approaching train, or to check the speed thereof, or to use any means to prevent a collision; that said Bailey at all times used proper care and caution, slowed down, and looked and listened, but, failing to see or hear the train, proceeded to cross appellant's railroad track at said crossing; that by reason of the premises, and without fault on her part or of said Bailey, the train was run upon and against appellee's automobile, because of the careless and negligent manner in which the train was operated at said point, completely destroying the same to her damage. Appellant filed a demurrer to this complaint for want of facts, which was overruled, and then filed an answer in general denial. The cause was tried by a jury, which returned a verdict in favor of appellee, on which judgment was rendered. Appellant filed a motion for a new trial,

which was overruled, and has assigned the action of the court in overruling its demurrer to the complaint and in overruling its motion for a new trial as the sole errors on which it relies for reversal.

Appellant's main contention, in regard to the action of the court in overruling its demurrer to the complaint, is based on an alleged absence of

1. any averment showing that appellee was free from contributory negligence. It may be conceded, as contended by appellant, that, this
2. being an action to recover damages for injury to personal property, the complaint must negative contributory negligence, and that under the allegations of the complaint the negligence of the driver of the automobile, if any, was the negligence of appellee. Appellant insists, in support of its contention, that the charge that the damage inflicted without fault on her part, or on the part of her servant operating the automobile, but because of the careless and negligent manner in which appellant's train was operated, does not show appellee to have been without fault. It further insists that if it can be deduced from the complaint that appellee's said servant did not know of the approaching train, such fact would not be sufficient for such purpose. It should be noted, however, that the complaint alleges the further fact that the driver of said automobile "then and there, all the time, used proper caution, and slowed down and looked and listened, but failed to see any train, and then proceeded to cross said railroad at said intersection of Buntin and Eleventh streets." Appellant seeks to invoke the rule that a person approaching a railroad crossing is bound to see what he could have seen and to hear what he could

Chicago, etc., R. Co. v. Van Stone—68 Ind. App. 47.

have heard. This principle, however, is only applicable where it appears that the person charged with the exercise of care is so situated that he could see the train in time to escape injury, with nothing to excuse his failure to see or hear. *Grand Trunk, etc., R. Co. v. Reynolds* (1910), 175 Ind. 161, 92 N. E. 733, 93 N. E. 850. The allegations of the complaint do not show, or furnish a basis for an inference, that appellee's servant was in such a position before the accident that he could have seen or heard the approaching train in time to escape injury, with nothing to excuse his failure to look or hear, but specifically alleges that at all times he exercised proper caution, "slowed down and looked and listened." Appellant also

4. insists that there is a presumption of contributory negligence against the driver of the automobile, and that this, with the failure to aver that he could not see and hear the approaching train, makes the complaint insufficient. There was no presumption against the driver of the automobile as claimed by appellant. A person injured or damaged at a railway crossing by collision is not aided by a presumption of freedom from fault, nor is the railway company aided by a presumption of contributory negligence. *City of Indianapolis v. Keeley* (1906), 167 Ind. 516, 79 N. E. 499; *Grand Trunk, etc., R. Co. v. Reynolds, supra*. We are of the opinion that the complaint sufficiently charges that the

3. failure to see or hear the approaching train in time to avoid the collision was due to appellant's negligence in operating its train at a dangerous rate of speed in violation of a city ordinance, and in failing to ring any bell or give any warning of its

Chicago, etc., R. Co. v. Van Stone—68 Ind. App. 47.

approach, and that appellee was free from fault. The demurrer was properly overruled.

The record discloses that at the close of the evidence and before the beginning of the argument appellant requested the court to instruct the jury

5. in writing, and tendered certain instructions with a request that they be given. Among these instructions was No. 1, which reads as follows: "The court instructs the jury to return a verdict for the defendant." The court refused to give this instruction, and appellant assigned this ruling as one of its grounds for a new trial. Appellant contends that the court erred in refusing to give this instruction for the reason that the complaint is based on acts of negligence alleged to have been committed by it in the operation of its line of railroad through said city of Vincennes, while the uncontradicted evidence shows that appellant was not operating the railroad at the time of the commission of said negligent acts, but that it was in the hands of receivers, who were operating the same. The law appears to be well settled that, where an action is brought against a railroad company for damages based on negligence in operating its road, it is a sufficient defense to show that the road at the time of the commission of the alleged negligent act was not in its possession and control, but was in the possession and control of a receiver, who had exclusive charge of the employment and management of the agents and employees engaged in operating such railroad. *Ohio, etc., R. Co. v. Davis* (1864), 23 Ind. 553, 85 Am. Dec. 477; *Bell v. Indianapolis, etc., R. Co.* (1876), 53 Ind. 57; *State v. Wabash R. Co.* (1888), 115 Ind. 466, 17 N. E. 909, 1 L. R. A. 179; *Godfrey v. Ohio, etc., R. Co.*

Chicago, etc., R. Co. v. Van Stone—68 Ind. App. 47.

(1888), 116 Ind. 30, 18 N. E. 61; High, Receivers (4th ed.) §396; *Naglee v. Alexandria, etc., R. Co.* (1887), 83 Va. 707, 3 S. E. 369, 5 Am. St. 308, and note. On the trial appellee did not offer any evidence to show who was operating the railroad at the time of the accident. Appellant introduced in evidence a certified copy of an order of the District Court of the United States, made on May 27, 1913, in a cause then pending therein against it. By this order William J. Jackson and Edwin W. Winter were appointed receivers of all the property of appellant, including all its tracks, locomotives, cars, and other rolling stock and equipment of every kind, and were directed to take immediate possession of the same, to use and manage it, and conduct the business of the company in such manner as in their judgment would produce the best results. Said receivers were also given authority to exercise the franchises of the company and to operate its railroads, and to that end to employ and discharge all officers, attorneys, managers, superintendents, agents and employes, and to fix the compensation thereof. The order also provided that all persons, firms, and corporations having in their possession any of the property and premises of the company of which receivers were thereby appointed were directed to deliver the same to said receivers. It also restrained and enjoined appellant, and its officers, directors, agents, attorneys, employes, and all persons claiming to act by virtue of, or under the authority of, appellant from interfering with, or disturbing, any portion of the property or premises for which said receivers were appointed. It further provided that said receivers should retain possession of the said property of appellant and discharge the

duties of their said trust until the further order of the court. E. R. Glidden was introduced as a witness by appellant, and testified in part substantially as follows: I am superintendent of the Chicago and Eastern Illinois Railroad for its receivers. I have been acting as such since June 15, 1913, and was so acting on February 23, 1914. The portion of said railroad for which I have been so acting extends between Evansville and Terre Haute, and passes through the city of Vincennes, and was so located on said last-named date. At that time appellant was not operating said portion of its railroad, but it was managed and controlled by Edwin W. Winter and W. J. Jackson, receivers. It had been so operated from the date of their appointment to the present time, including February 23, 1914. This evidence was not contradicted. It was further shown that the injury in question was inflicted on the last-named date. It thus became an undisputed fact at the close of the evidence that appellant was not operating that portion of its railroad which passed through Vincennes, Indiana, where the alleged negligent act was committed, but that it was in the possession of receivers and being operated by them.

But appellee contends that there is no showing that appellant's property was in the hands of receivers, as there was no evidence that those named in the order of appointment had been qualified and had taken charge of the same. True, there is no evidence showing their qualification, but there is ample evidence that they had taken possession of that part of appellant's railroad, which runs through the city of Vincennes where the alleged negligence occurred, and was operating the same at the

Chicago, etc., R. Co. v. Van Stone—68 Ind. App. 47.

time of the accident in question. Whether or not they had actually qualified is not a controlling fact. The important question is, Was the railroad at the time actually in the possession of, and being operated by, appellant? If it was not, it is not answerable for the negligence charged. Thus it has been held that a steamship company would not be liable for negligence in transporting merchandise, while its property was in the possession of, and being operated, by a receiver, although the order appointing such receiver might be void. *Ocean Steamship Co. v. Wilder & Co.* (1899), 107 Ga. 220, 33 S. E. 179. It is apparent that where receivers are attempting to assert some rights as such their qualification might become an important factor, but such is not the case here. Appellant also insists

that the question under consideration could

7. only be raised by a special answer. This contention is not well taken, as expressly held in the case of *Ohio, etc., R. Co. v. Davis, supra*. Under the facts of this case, as established by the undisputed evidence, appellee was not entitled to recover, and the court erred in refusing to give the jury instruction No. 1 tendered by appellant.

Appellant has presented other alleged errors which it is not necessary to consider under the conclusion we have reached. Judgment reversed, with instructions to sustain appellant's motion for a new trial, and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 119 N. E. 874. See under (1) 29 Cyc 575; (2) 29 Cyc 545; (3) 33 Cyc 1060; (4) 33 Cyc 1070; (5, 6) 33 Cyc 622, 722; (7) 33 Cyc 730. Railroads: care required of driver of automobile at railroad crossing, 21 L. R. A. (N. S.) 794, 29 L. R. A. (N. S.) 924, 46 L. R. A. (N. S.) 702.

Perry v. Carey—68 Ind. App. 56.

PERRY v. CAREY ET AL.

[No. 9,496. Filed June 20, 1918.]

1. **PLEADING.—General Issue.—Abandonment of Rights in Lands.**—Where the strict legal title to real estate is not involved the defendant may prove, even under the general issue, that the rights of plaintiff in lands have been abandoned. p. 59.
2. **EASEMENTS.—Easement Acquired by Grant.—Abandonment.—Intention.**—An easement of a way resting in a grant may be abandoned by the dominant owner, but the question of abandonment is one of intention which must be determined from the facts of each particular case. p. 60.
3. **EASEMENTS.—Easement Acquired by Grant.—Nonuser.—Effect.**—While an easement acquired by actual grant cannot be lost by mere nonuser, a cesser of the use, accompanied by acts clearly indicating an intent to abandon the right, will have the effect of an express release and work an extinguishment of the easement. p. 60.
4. **EASEMENTS.—Easement Acquired by Grant.—Abandonment.—Evidence.—Acceptance of Other Way.**—Where defendants' grantees were given an easement of way which they never used, but accepted and used a more convenient one subsequently furnished by defendants, the grantees' acceptance of the new way was not as a matter of law an abandonment of the granted easement, but could be considered as an element on the issue of the intention to abandon such easement. p. 60.

From Huntington Circuit Court; *Sumner Kenner*, Special Judge.

Action by Lindsey E. Perry against Mary A. Carey and another. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

Bowers & Feightner and *A. G. Johnson*, for appellant.

R. A. Kaufman and *Watkins & Butler*, for appellees.

IBACH, J.—In the year 1883 Mary E. Carey owned lot 262 and the adjoining west half of lot 18, both

fronting on Market street in the city of Huntington, Indiana. On April 10 of that year she, with her husband, conveyed by warranty deed to Anglemyer and Anglemyer "61 feet off the east end of lot 262 except 4 rods off the north side." The deed of conveyance also contains the following:

"The parties of the first part in consideration of a part of the purchase money do hereby agree by and with the said parties of the second part to grant to them a perpetual right of way ten (10) feet wide on and along the west line of Lot (18) Eighteen from Market street to the south bank of Flint creek and it is hereby expressly understood that said right of way is granted to and for the benefit of the lot hereby conveyed and to none other."

The Anglemyers continued to hold title to the lands thus conveyed and remained in possession thereof until November 22, 1913, when they conveyed the same lands by warranty deed to appellant, who brought this suit against appellees to quiet his title to a ten-foot strip of land along the west line of lot 18 and to enjoin appellees from obstructing the same.

Appellees answered by general denial, and also filed a cross-complaint in which they seek to quiet their title to a portion of the said ten-foot strip of land. It is averred in the cross-complaint, in substance, that the ten-foot strip in question was granted as a right of way for the use of the land conveyed, extending from Market street to Flint creek; that lot 18 is bounded on the north by Flint creek, and at the point where the north end of the right of way would terminate there was a steep bank and a deep channel, and said right of way was not connected with any

other street or alley or other means of ingress or egress. The Anglemyers took possession of the lot conveyed to them and used and occupied the easement in common with the appellees as far north as the right of way opened by appellees extending east and west, and never used or occupied that part of said easement extending northward from the latter right of way. With the consent of the Anglemyers appellees moved to a barn back near the north end of lot 18, and a driveway east and west was opened up across lot 18, for the use of the Anglemyers, to a public alley which opened into Market street. The Anglemyers accepted such right of way in lieu of the easement granted in the deed, and for more than twenty years continued to use the same. With the consent of the Anglemyers appellees made improvements on the strip of land by constructing drains, erecting buildings, planting trees and vines thereon. Appellees have been in full and open possession of said tract of land with the full knowledge and consent of the Anglemyers for more than twenty years and are still in possession. Appellant purchased said lot from the Anglemyers with full knowledge that the right of way had been abandoned, and that appellees were in possession of the north end thereof; that valuable and lasting improvements had been made thereon, and with full knowledge that said easement had been changed and opened into the alley on the east side of the west half of lot 18, and accepted, used, and occupied, and is now using and occupying the easement so opened into said alley in common with appellees.

Appellant answered the cross-complaint by general denial. There was a trial by jury and a verdict for

appellees on their cross-complaint. Over appellant's motion for a new trial judgment was rendered in favor of appellees, quieting their title to that part of the ten-foot strip of land described in their cross-complaint.

The only error assigned is the overruling of the motion for a new trial. Appellant in his brief challenges some of the instructions, but in the oral argument the action of the court as to these matters was admitted to be substantially correct, and there remains but one question, and that is the sufficiency of the evidence to sustain the verdict.

It will be observed from the deed of conveyance that appellant was granted an easement appurtenant to the lot purchased and for the sole benefit thereof. Not only is this apparent from the grant itself, but such seems to be the theory upon which the complaint was framed and the cause tried, as well as the construction given the grant by all the parties. Therefore the controlling question for our determination is, Can such an interest in lands be abandoned, and, if so, do the facts of this case show an abandonment?

It has been held generally that the fee-simple title to real estate acquired by deed or descent cannot be lost by mere abandonment. *Barrett v. Kansas, etc., Coal Co.* (1905), 70 Kan. 649, 79 Pac. 150. Neither can a title obtained by prescription be so lost. *Tarver v. Deppen* (1909), 132 Ga. 798, 65 S. E. 177, 24 L. R. A. (N. S.) 1161, and cases cited.

But the rule seems to be that, when the strict

1. legal title to lands is not involved, the defendant may prove, even under the general issue, that the rights of the plaintiff have been abandoned.

Kammerling v. Grover (1893), 9 Ind. App. 628, 36 N. E. 922; *Bell v. Bed Rock, etc., Co.* (1868), 36 Cal. 214; *Willson v. Cleaveland* (1866), 30 Cal. 192. So

that in cases such as is now under consideration, when the land in controversy constitutes a way resting in a grant, the same may be abandoned by the dominant owner, but the question of abandonment is one of intention, and must be determined from the facts of each particular case.

While it is the law that an easement acquired by actual grant cannot be lost by mere nonuser (*Kammerling v. Grover, supra; Cleveland, etc., R.*

3. *Co. v. Griswold* [1912], 51 Ind. App. 497, 510, 97 N. E. 1030), it has been repeatedly held, and we think correctly, that: "It is not the duration of the cesser of use of a way, but the nature of the act done by the dominant owner, or by the adverse act acquiesced in by him, and the intention which the one or the other indicates, that is material and a cesser of the use for a less period than twenty years, accompanied by acts clearly indicating an intent to abandon the right will have the effect of an express release and work an extinguishment of the easement." *Vogler v. Geiss* (1879), 51 Md. 407; *King v. Murphy* (1855), 140 Mass. 254, 4 N. E. 566. So that the period of nonuser is material as an element from which an intention to abandon may be inferred, and what period will be sufficient in any particular case must depend on all the accompanying circumstances.

The facts of this case show that the Anglemeyers never used the portion of the way now in dispute at any time, but that they accepted and used the

4. one subsequently furnished by appellees in lieu of it, and, while it is not to be said as a

Bright Nat. Bank v. Hanson—68 Ind. App. 61.

matter of law that such a way is abandoned by the use of another more useful and more convenient, yet such fact may be considered as an element in determining whether when they so acted it was their intention to abandon the old easement. As bearing on this subject, see *Jamaica, etc., Corp. v. Chandler* (1876), 121 Mass. 3.

It is not necessary for us to repeat the evidence introduced at the trial; it is sufficient to say that there is some evidence tending to support each material averment of the cross-complaint.

Applying the legal principles above announced to these facts, we believe the evidence was sufficient to warrant the conclusion reached by the jury that the Anglemyers and appllees had in fact intended to and did abandon that portion of the right of way here involved.

Judgment affirmed.

NOTE.—Reported in 119 N. E. 1010. See under (1) 1 C. J. 11; (2) 19 C. J. 940; (3) 19 C. J. 942; (4) 19 C. J. 940.

BRIGHT NATIONAL BANK v. HANSON.

[No. 9,022. Filed June 9, 1918. Rehearing denied November 23, 1918. Transfer denied June 21, 1918.]

1. **BILLS AND NOTES.**—*Action on Note.*—*Defenses.*—*Pleading Fraud.*
—In an action on notes, an answer of fraud alleging that plaintiff, the holder of the notes, united with the payee, an administratrix, in fraudulently inducing defendant to execute them is good as against demurrer, even though the estate of the administratrix may not have been bound by her false representations. p. 68.
2. **APPEAL.**—*Briefs.*—*Waiver of Error.*—Assigned errors which are not mentioned or referred to in the points and authorities in appellant's briefs are waived. p. 68.

Bright Nat. Bank v. Hanson—68 Ind. App. 61.

3. **BILLS AND NOTES.—Actions.—Defenses.—Fraud.—Pleading.—*Bona Fides.*—Burden of Proof.**—In an action by an assignee of notes against the maker, an answer setting up that the execution of the notes was procured by fraud is sufficient without an allegation that plaintiff had knowledge of, or connection with, the fraud averred, since, when a note is shown to have been obtained by fraud, the holder must show that he took it before maturity, without notice and for a valuable consideration. p. 70.
4. **EXECUTORS AND ADMINISTRATORS.—Administrator's Torts.—Liability of Estate.**—Generally an estate will not be rendered liable for any damages resulting from any false statements, representations, or warranties made by the administrator. p. 71.
5. **EXECUTORS AND ADMINISTRATORS.—Management of Estate.—Fraud of Administrator.—Liability of Estate.**—Where the court gave an administratrix full and general authority to carry on deceased's business, and in so doing she fraudulently, but within the apparent scope of her powers, obtained certain notes and turned them over to the estate, her fraud was chargeable to the estate. p. 71.
6. **SALES.—Rescission by Buyer.—Return of Consideration.—When Necessary.**—A buyer defending an action on the purchase notes on the ground of fraud need not allege and prove an offer to return the goods where they were worthless. p. 74.
7. **APPEAL.—Review.—Harmless Error.—Admission of Evidence.**—Error, if any, in permitting an agent to testify as to the agency relationship was harmless, where there was other uncontradicted evidence establishing the fact. p. 75.
8. **SALES.—Action for Price.—Defenses.—Rescission.—Damages.**—Where one has been induced to purchase property by the seller's fraudulent representations, he may rescind the contract and offer to return anything of value received under it or may stand upon his contract and recover as damages the difference between the actual value of the property at the time it was received and its value if it had been as represented. p. 77.
9. **SALES.—Action on Notes for Price.—Defenses.**—A defrauded buyer who has given his notes for the purchase price has the same defenses in an action by the seller on the notes as in a direct action for the purchase price. p. 77.
10. **SALES.—Action for Price.—Defenses.—Pleading.—Variance.**—Where, in an action against the buyer for the purchase price of property, he filed an answer claiming a rescission for fraud, he should be confined to that theory, and is not entitled to have such answer in bar treated as a counterclaim under which he could recover the difference between the value of the property received and its value if it had been as represented. p. 77.

Bright Nat. Bank v. Hanson—68 Ind. App. 61.

11. **APPEAL.—Review.—Harmless Error.—Refusal of Instructions.—Cure by Verdict.**—Where, in an action on notes given for the purchase price of goods, defendant buyer claimed a rescission of the sales contract for fraud, a refusal to instruct that he must restore or offer to restore everything of any value received under the contract was harmless, since the jury, in returning a verdict for defendant, must necessarily have found that the property for which the notes were given was of no value. p. 78.
12. **APPEAL.—Review.—Harmless Error.—Instructions.—Cure by Verdict.**—In an action on notes given for the purchase price of goods, where defendant buyer claimed a rescission of the sales contract for fraud, an instruction that the amount of plaintiff's recovery might be reduced by the difference between the fair market value of the property received and its value if it had been as represented, was harmless, where the jury, in returning a verdict for defendant, must necessarily have found that the property was valueless. p. 78.

From Noble Circuit Court; *Luke H. Wrigley*, Judge.

Action by Bright National Bank against Edward M. Hanson. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

J. Earl Fouts and *Leffner, Ball & Needham*, for appellant.

Gates & Whiteleather and *Grant & Foote*, for appellee.

HOTTEL, P. J.—This is an action in which appellant, a banking corporation, filed in the trial court three separate paragraphs of complaint, in each of which, respectively, it sought to recover on a note held by it as assignee.

The notes sued on are in substance the same, except as to amount and date of maturity, and this difference also distinguishes the several paragraphs of complaint, so that, for the purposes of the questions presented by the appeal, it will be sufficient to indicate

Bright Nat. Bank v. Hanson.—68 Ind. App. 61.

the substance of the first note and the paragraph of complaint based thereon. Such note is as follows:

“\$600.00 Town LaOtto, State Ind. Sep. 29, 1911.

“On the first day of March, 1912, after date we, or either of us promise to pay to the order of the Medical Chemical Company South Omaha, Nebraska Six Hundred—0/100 Dollars, Payable Garrett Banking Co., value received, without discount or offset, waiving our rights to all exemptions allowed us by law, with interest at 6 per cent. from date, if not paid when due or when presented.

“County of Noble Edward M. Hanson

“Witness: Dr. W. F. Larimer 38234 26122.”

Said paragraph of complaint alleges in brief that appellant is a corporation; that appellee executed the note to the payee, the Medical Chemical Company; that when due it was presented for payment at the place named therein, viz., the Garrett Banking Company of Garrett, Indiana; that payment thereof was refused; that such note is past due and unpaid; that on September 29, 1911, Minnie Doty was the administratrix of the estate of William M. Doty, deceased, and as such under order of the Delaware Circuit Court, in carrying on the business of decedent, took and received said note from appellee by the style of The Medical Chemical Company (hereinafter referred to and designated the “M. C. Co.”); that such company existed in name only, which name was adopted by the administratrix as a trade-name, the same having been used by the deceased in his lifetime; that such estate was the actual original payee of said note and the real owner thereof, the

Bright Nat. Bank v. Hanson—68 Ind. App. 61.

name "M. C. Co." being placed therein as payee and used as an accommodation to said estate, at the direction of the administratrix; that on December 7, 1911, said administratrix by authority of the Delaware Circuit Court, for a valuable consideration, sold and delivered said note to Frank E. Hay as "Frank Hay," by indorsement on the back of said note as follows:

"By virtue of an order of the Delaware Circuit Court, of Delaware County, Ind. I as administratrix of the estate of William M. Doty, deceased, hereby sell, assign and transfer the within and foregoing note to Frank Hay, for a valuable consideration, for and on behalf of said estate.

"M. Doty, Administratrix of the estate of William M. Doty, deceased."

That at the time of this assignment said estate was the sole and exclusive owner of such note, and by such assignment the absolute and complete ownership of such was passed to said Hay; that thereafter on December 7, 1911, said Hay, for value, by written indorsement on the back thereof, sold and delivered said note to this plaintiff, which written indorsement is as follows:

"Pay to the order of Bright National Bank, without any recourse on me. Frank E. Hay."

That appellant is the owner and holder of said note.

The other notes are for \$500 each.

Appellee filed an answer in seven paragraphs, the first of which was a denial. The second amended paragraph alleged that on September 29, 1911, appellee entered into an agreement with the M. C. Co. to purchase 20,000 pounds of stock food, claimed to be

manufactured by such company, and known as "Protection Stock Powder"; that in truth and in fact there was no M. C. Co., but appellee did not know this until long after said contract was made and said notes executed; that said name had been adopted by William Doty for the express purpose of deceiving and defrauding persons with whom he dealt; that Dr. W. F. Larimer was the agent of such company and entered into the contract with appellee for and on behalf of the so-called company. Here follows averments as to representations made by said Larimer with reference to the things to be done and furnished by such company and the many ailments of animals for which such powders were a remedy or cure, including also a representation that such company was a corporation financially responsible for all its contracts, and that such powders would be fresh and in good condition and would meet all the representations made by said M. C. Co. The answer then avers that for said stock powder and the other enumerated things to be done and performed by said M. C. Co. appellee executed the notes sued on, and then proceeds in substance as follows: At the time of making said representations Larimer knew that the powders sold to this appellee had been sold to one Frank E. Hay, and that notes were held by appellant and payment thereof had been refused by Hay; *that appellant knew of all the representations made by said Larimer, and knew that the purpose was to deceive appellee, and having purchased of said M. C. Co., or the said William Doty, or his representatives, said powders, the notes of the said Hay were to be returned to him and the notes of appellee taken in their place; that appellant accepted said notes from Hay*

and had him indorse the same "without recourse" to it, all without the knowledge of appellee; that appellant, through its officers, was a party to the fraud practiced upon appellee, and knew at the time of making the said contracts that the powders which were furnished appellee were of no value at all, and that said notes were being executed without any consideration whatever passing to appellee; that when such powders are manufactured they are in powder form, and it is intended that they shall be sold and used when in that form; that after a time they will become solid and hard, unfit for use and of no value; that the powders sold to appellee soon after delivery became hard and solid and were of no value; that Larimer, acting for said company, represented to appellee that said powders would not become hardened and solidified and were fresh and direct from the company, all of which was false and untrue; that all the said representations and statements of the said Larimer and of said M. C. Co. were false and untrue and made for the purpose of cheating and defrauding appellee and to induce him to execute the notes sued on; that appellee relied on said statements and representations and believed them to be true and was thereby induced to execute said notes.

To this paragraph appellant filed a demurrer for want of facts, which was overruled, and this ruling is assigned as error. Several objections are stated in the memorandum accompanying such demurrer, but the only objection to the sufficiency of such paragraph urged in appellant's brief is that it proceeds on the theory of fraud, and that an administratrix, under the law of this state, cannot be charged with fraud or fraudulent representations in making sale

4

of personal property of the estate, upon which she is administering; that whatever misrepresentation may have been made by said administratrix in the sale of said powders, if any, was a personal wrong, by which said estate could not be bound.

While this paragraph of answer contains averments, some of which we have not set out, *supra*, which might indicate a different theory, we

1. think, when considered in its entirety, its theory is as stated by appellant. However, as affecting the question presented by appellant's objection, *supra*, the legal proposition stated therein, if correct, would not be of controlling importance, because the facts stated in the italicized portion of said answer, *supra*, charge that appellant was a party to the fraud perpetrated on appellee, and hence makes the answer sufficient to avoid appellant's objections, even though its assignor, the estate of said administratrix, may not have been bound by the representations made by the agent of such administratrix.

The ruling on the demurrer to the third paragraph of answer is also assigned as error, but, as the question presented thereby is substantially the same as that presented by said objection to the second paragraph, it need not be further considered.

The fourth and fifth paragraphs of answer each aver that the notes in suit were given without any consideration, the difference between them be-

2. ing that the fourth paragraph contains an averment not found in the fifth paragraph, to the effect that appellant knew when it purchased such notes that their execution had been fraudulently procured, and that they were given without consideration. A demurrer to each of these paragraphs was

overruled, and each of such rulings is assigned as error, but neither is mentioned nor referred to in appellant's points and authorities, and is therefore waived.

A reply to each of said paragraphs of answer was filed, in which it is averred that Minnie Doty was the administratrix of the estate of William M. Doty, deceased, appointed by the Delaware Circuit Court prior to the time of the execution of the notes sued on; that notice of her appointment had been made by publication in a weekly newspaper, and that she was acting under an order of the court, and under such order, and not otherwise, sold to this appellee the stock powder for which he executed his notes, that all of said facts were known by appellee when he purchased such powders and executed the notes in suit in payment thereof.

A demurrer to this reply was sustained, and this ruling is assigned as error and urged as ground for reversal. Appellant suggests no reason in support of his contention that is not in effect disposed of by our disposition of the ruling on the demurrer to the amended second paragraph of answer.

A seventh paragraph of answer was filed by appellee, which is not essentially different from the amended second or third paragraphs, except that it goes more into detail in the averments charging fraudulent representations made by Larimer, the agent of the administratrix, and omits all averments charging knowledge of and participation in such fraud on the part of appellant. It also expressly charges that the powder for which such notes were given were of no value, but does not charge that appellant knew such fact when it purchased said notes.

A demurrer to this answer was also overruled, and such ruling is urged as ground for reversal. The objections, *supra*, made to the amended second

3. and third paragraphs of answer are repeated and urged against this paragraph. As this paragraph does not charge appellant with knowledge of or participation in the fraud charged in the sale of said powders, the question presented is essentially and materially different from that presented by such other rulings. The theory of this answer is that the "payee named in the note, the M. C. Co., was a fictitious company used by the administratrix of said estate, the true payee, and that the execution of the notes was induced by the fraudulent representations of Larimer as agent of such administratrix," and if the averments of such answer are in fact sufficient to show that the execution of such notes was fraudulently procured, the averments charging appellant with knowledge of, or connection with, such fraud were not essential to its sufficiency, because it has been uniformly held in this state that: "While the common-law rule protecting a *bona fide* holder prevails, yet they also hold that in order to receive its protection it devolves upon the plaintiff to show that he became a holder before maturity, without notice, and for a valuable consideration, whenever the defendant makes it appear that the note was obtained by fraud." *First Nat. Bank, etc. v. Ruhl* (1890), 122 Ind. 279, 23 N. E. 766; *Zink v. Dick* (1890), 1 Ind. App. 269, 273, 274, 27 N. E. 622; *Shirk v. Neible* (1900), 156 Ind. 66, 72, 59 N. E. 281, 85 Am. St. 150, and cases cited.

We must therefore determine whether the false representations alleged to have been made by the

agent of said administratrix in procuring the execution of such notes can be invoked as a defense to their collection. As hereinbefore indicated, appellant insists that any fraud or fraudulent representations made by such administratrix or her agent would be a tort and a personal wrong by which her said estate could not be bound.

It is no doubt true, as appellant contends, that generally speaking an estate will not be rendered liable for any damages resulting from any false state-

4. ments, representations, or warranties made by the administrator. *Riley v. Kepler* (1884), 94 Ind. 308; *Huffman, Admx., v. Hendry* (1893),

5. 9 Ind. App. 324, 53 Am. St. 351, 36 N. E. 727, and cases cited. This is so because an admin-

istrator as such has no authority to make such statements, representations, or warranties for or on behalf of his estate, and hence, if liable at all, he is individually liable. However, we do not believe that this principle should be applied to a case where the administrator by the order of the court was authorized to carry on the business of his deceased, and where, in so carrying on such business, he fraudulently obtains and retains for such estate an unconscionable advantage and benefit. It appears from appellant's reply and from the evidence that this administratrix procured an order of the Delaware Circuit Court by which she was authorized as administratrix of said estate to carry on the business of her deceased husband in the name and style of the M. C. Co. The petition on which this order is based and the order itself are very broad and comprehensive. They give the administratrix full and general power and authority to "continue and carry on the business of her

deceased husband in the name and style of the Medical Chemical Company," which business "consisted in the sale of stock foods, medicines and powder for the use of horses and other stock." She was given authority to carry out the contracts of her deceased husband to employ persons to assist her therein, and to sell such notes held by her as administratrix as might be necessary in the carrying on and continuing of said business. In other words, the order, in effect, permitted the administratrix to step into the shoes of her deceased husband and continue and carry on his business for the benefit of his estate and employ agents to assist her therein. The acts of such administratrix in the matter were therefore akin to the acts of an agent of the estate of her deceased husband, rather than the acts of an administratrix proper of his estate. The representations therefore of said Larimer, who was the husband's agent, and who continued as the agent of the administratrix, were at least within the apparent scope of the authority given by such order. We do not mean to say that such order authorized said administratrix or her agent to make false representations, but the order allowed such administratrix to select and pursue her own method in carrying on such business. It should follow, we think, that if in carrying on such business she adopted a fraudulent method and thereby secured an unfair advantage or an unearned and unconscionable benefit to such estate, she as administratrix, while her estate retains the fruits of such fraud, ought not to be heard to defend, as against such wrongful act, that she had no right to make the representations whereby she secured to the estate such advantage and benefit. The consummation of

the fraud having been made possible by the court's order, a holding in accord with appellant's contention would in effect make the court a party to the fraud. Suppose this were a suit by the administratrix to recover on the note given for said powders, and there was an answer setting up the fraud, would a court, under the circumstances here shown, permit the administratrix to avoid such defense and recover for the estate the fruits of her fraud on the ground that she as such administratrix could not be bound by her fraudulent representations? To so hold would be not only to give to such fraud the sanction and approval of the court, but the court would thereby aid in its consummation by assisting and making it possible for the estate to obtain the fruits thereof.

The instant case is not essentially different from the supposed case. The fact that the estate has obtained the fruits of the fraud from the assignee of said note does not in our judgment affect the question under consideration. The assignee steps into the shoes of his assignor and is in no better situation than such assignor would be, unless a purchaser in good faith without knowledge of the fraud.

As especially applicable to the facts of this case, we quote the following language of the Supreme Court of Texas in the case of *Able v. Chandler* (1854), 12 Tex. 88, 92, 62 Am. Dec. 518: "Though the administrator of an estate cannot bind the estate by his warranty, or render it responsible in damages for frauds or torts, committed by him, yet in his dealings with third persons, in respect to the estate, he is not, by his representative character, absolved from the universal obligation to observe the dictates of natural justice and common honesty, which require

that he shall act fairly and not fraudulently. Nor can the estate which he represents be permitted to derive an unjust and unconscientious advantage, to the injury of those with whom its legal representative contracts, by means of his unauthorized fraudulent conduct." See, also, *Crayton v. Munger* (1852), 9 Tex. 285; *Williamson v. Walker* (1854), 24 Ga. 257, 71 Am. Dec. 119; *Ramsey v. Blalock* (1861), 32 Ga. 376, 380; *Rice v. Richardson* (1842), 3 Ala. 428; *Atwood v. Wright* (1856), 29 Ala. 346.

We therefore conclude that the trial court did not err in overruling the demurrer to said seventh paragraph of answer.

Under its motion for new trial appellant contends that the verdict of the jury is not sustained by sufficient evidence. In support of this contention,

6. it is insisted in effect that appellee defended solely on the ground of fraud and no consideration; that the paragraphs of answer based on fraud did not plead a return or offer to return the powders for which the notes were given, but alleged that they were of no value; that the evidence discloses that such powders had value, and hence that under the pleadings, the defense must fail.

While the evidence on this branch of the case was by no means conclusive, there was some evidence to the effect that the stock powder was in a solidified state when it reached appellee, and when in such state it had no value. This was sufficient to prevent a reversal of the case on said ground.

It is insisted that the court erred in admitting in evidence a pamphlet upon which, and the statements therein made, appellee bases his proof of fraud in part. The objection made thereto was in substance

that the administratrix could not bind the estate by her representations. This objection is in effect disposed of by what we have said in regard to the sufficiency of the seventh paragraph of answer.

Appellant next insists that the court erred in permitting appellee to testify that Larimer told him that

he was the agent for the Medical Chemical

7. Company—that he was a general agent. While

it is true, as appellant contends, that agency cannot be proved by statements made by the agent himself, there was testimony of other witnesses in this case, which was uncontradicted, to show such agency, and in fact such agency seems not to have been contraverted. The error, if any, was therefore harmless.

The action of the court in refusing to give certain instructions tendered by appellant and in giving other instructions is relied on and urged as ground for reversal. Among the refused instructions tendered by appellant was the following: "The court instructs the jury that where the party elects to rescind a contract on the ground of fraud where he had actually been defrauded, he must restore, or offer to restore everything of any value which he received under the contract. He will not be permitted to undo the contract while retaining money or other thing of value delivered him under the terms of the contract."

Of the instructions given by the court, complaint is made of No. 4. In this instruction the court, after indicating what should be shown to establish fraud, said: "In such case if the facts above recited are established by a preponderance of the evidence the defense of fraudulent representation is made out,

and will reduce the amount of recovery upon the note to the extent of the difference between the fair market value of the property for which the note was given, in the condition it actually was when delivered, and what such market value would have been if the property had been as represented. In such a case if the property in the condition that it was when delivered was worth \$500 but would have been worth \$1,000 if it had been as represented, then the recovery upon the note would be reduced in the sum of \$500 or defeated altogether if such sum of \$500 equaled the amount of the note and interest."

Appellant, in effect, concedes that this instruction would be correct if appellee had sued appellant directly for damages, or had defended by way of counterclaim or set-off, but insists that appellee pleaded only answers in bar which proceeded on the theory that there was no liability on the notes sued on because they were procured by fraud and the stock powder for which they were given was of no value whatever.

We are of the opinion that appellant is right in its contention as to the theory of appellee's answers. Each of said answers are pleaded as a complete bar to the action. Neither of them is pleaded as a counterclaim, and neither alleges that appellee was damaged by the fraudulent representations set up therein. True, they each allege that the powders for which the notes were given were valueless, but such averment, in the absence of averments showing a return or an offer to return such powders, was proper and necessary to make the answers sufficient as an answer in bar, and, as before indicated, when such answers are read in their entirety, it is evident that such is

their theory, rather than as a counterclaim for damages.

Where one has been induced to purchase property by the fraudulent representations of the seller, such purchaser has a choice of remedies: (1) He

8. may, if he so desires, rescind the contract, in which case he must, in his action to rescind, aver and prove a return of the property received by him, or an offer to return it, or otherwise aver and prove that such property was of no value. (2) He may stand by his contract and keep what he received and in an action for damages recover the damages resulting from the fraud which, ordinarily, will be the difference between the actual value of the property as it was when received by the purchaser and what its value would have been if it had been as represented. *Wulschner-Stewart Music Co. v. Hubbard* (1909), 44 Ind. App. 526, 89 N. E. 794; *Jarrett v. Cauldwell* (1910), 47 Ind. App. 478, 94 N. E. 790; *Brier v. Mankey* (1910), 47 Ind. App. 7, 93 N. E. 672; *Love v. Oldham* (1864), 22 Ind. 51, 52; *Cates v. Bales* (1881), 78 Ind. 285. If such purchaser, as in the instant case, has given his note or obligation

9. for such property, he has the same remedies in an action brought by the seller on such note or other obligation. In either case, however,

10. as in all other cases, the remedy to which he is entitled must be determined from his pleadings, and if in the first instance he retains the property and brings an action to rescind the contract because of the fraud, alleging that the property received was of no value, or in the second instance, in an action against him for the purchase price of the property, defends with an answer in bar which

proceeds on the theory that the obligation sued on was fraudulently procured and given for property of no value, he should in either case be confined to the remedy to which his pleadings entitle him, and not be given the advantage of an opportunity to recover upon the theory that his pleadings in the one case might be treated either as an action to rescind or an action for damages, and in the other case as an answer in bar or as a counterclaim for damages.

While there is language in some of the decisions which may seem to authorize the instruction, *supra*, given by the court, the effect of such instruction was to give to appellee the advantage of having his answer in bar, based on the theory that the notes sued on were obtained by fraud in exchange for property of no value, treated also as a counterclaim for damages for the fraud reducing appellant's recovery in whatever amount the jury might find to be the difference between the true value of the property received by appellee and its value if it had been as represented, and hence, for the reasons above indicated, the giving of such instruction was error. *Crow v. Carver, Gdn.* (1892), 133 Ind. 260, 32 N. E. 569; *Reichert v. Krass* (1895), 13 Ind. App. 348, 40 N. E. 706, 41 N. E. 835; *Cleveland, etc., R. Co. v. Rudy* (1909), 173 Ind. 181, 186, 89 N. E. 951; *Cates v. Bales, supra*.

For the same reason it was error to refuse to give the instruction, *supra*, tendered by appellant. However, the verdict in this case being a verdict

11. for appellee, it necessarily follows that the jury found that the stock powders for which the notes in suit were given were of no value,
12. and hence no harm could have resulted to ap-

pellant from that part of the instruction given which we have held to be erroneous, and likewise no harm could have resulted from the court's failure to give the instruction, *supra*, tendered by appellant. *Southern R. Co. v. Crone* (1912), 51 Ind. App. 300, 310, 99 N. E. 762.

Appellant complains of the court's refusal to give other instructions, but, in so far as such instructions are not covered by the instructions given, the errors alleged to have resulted from such refusal present the same questions already considered. So likewise the errors insisted upon as resulting from the giving of other instructions present questions which are in essence and substance the same as those already considered and disposed of adversely to appellant's contention.

We find no reversible error in the record, and the judgment below is therefore affirmed.

NOTE.—Reported in 113 N. E. 434. See under (1) 8 C. J. 930; (6) 35 Cyc 149; (9) 8 C. J. 716.

RUNYAN v. RUNYAN ET AL.

[No. 10,228. Filed June 21, 1918.]

APPEAL.—*Right of Appeal*.—*Estoppel*.—*Acceptance of Benefits*.—

Where a wife was granted a divorce, with alimony payable in monthly installments, and she ordered an execution on the judgment, the levy of which was enjoined in an action instituted by the husband, the wife's subsequent acceptance of the monthly installments was not an acceptance of benefits under the injunctive decree, since her right to alimony rested on the judgment in the divorce proceeding, and she could, therefore, maintain an appeal from the injunctive decree.

Runyan v. Runyan—68 Ind. App. 79.

From Huntington Circuit Court; *J. F. Charles*, Special Judge.

Action by Winfield Runyan against Nellie V. Runyan and Jacob E. Davis, sheriff. From a judgment for plaintiff, defendant Runyan appeals, and plaintiff moves to dismiss the appeal. *Motion to dismiss overruled.*

Branyan & Branyan, for appellant.

Watkins & Butler, for appellees.

CALDWELL, C. J.—By the judgment of the Huntington Circuit Court appellant was granted a divorce from appellee Runyan, and alimony in the sum of \$13,000, with six per cent. interest, payable in installments of \$75 per month. After a number of monthly payments of \$75 had been made, controversy arose between the parties, appellant claiming that under the judgment there should be paid each month \$75, together with interest on that sum from the date of the judgment; while appellee Runyan claimed that only \$75 was required to be paid monthly, and that such payments should continue until the entire judgment, principal and interest, had been discharged, subject to certain exceptions contingent on the life of appellant, but not applicable here, and respecting which there is no contention. Eventually appellant ordered an execution on the judgment for the purpose of collecting the accumulated interest due and unpaid, as viewed from her standpoint. This action was brought by appellee Runyan against appellant and appellee sheriff to enjoin further proceedings under the execution. A trial being had, the court decided the controversy in favor of appellee Runyan, and decreed that no further steps be taken under the

execution while appellee Runyan continued monthly payments of \$75 each. From this judgment appellant has appealed.

Appellee Runyan moves to dismiss the appeal, basing his motion on the following facts: During the pendency of this action, and after judgment was rendered in his favor as above indicated, appellee Runyan continued his monthly payments of \$75 each, all of which were received and accepted by appellant. Planting himself, therefore, on the general principle that he who accepts the benefits of a judgment may not appeal therefrom, appellee Runyan moves to dismiss the appeal.

Appellant's right to receive \$75 per month, while recognized by the judgment in this action, is not grounded thereon. That right rests on the judgment in the divorce proceeding. There was no controversy between the parties respecting the duty to pay, or the right to receive that amount. Both by the pleadings and the evidence in this action that duty was recognized, and that right conceded. That element of the case was not in controversy below, and will not be affected by the appeal here. Under such circumstances, it cannot be said that appellant has accepted benefits under the judgment appealed from. See 3 C. J. 680; 2 Cyc 653; 2 R. C. L. 63, and cases.

The motion to dismiss is overruled.

NOTE.—Reported in 119 N. E. 873.

Mowes v. Robbins—68 Ind. App. 82.

MOWES ET AL. v. ROBBINS.

[No. 9,603. Filed June 21, 1918.]

1. **FRAUD.**—*Sale or Exchange of Property.*—*Measure of Damages.*—The measure of damages for fraud in the sale or exchange of property is the difference in the actual value of the property received by the defrauded party and its value had it been as represented, so that an instruction, in an action for fraud in the exchange of horses, that plaintiff could recover the difference between his horse and the value of the horse received in exchange was erroneous. pp. 85, 86.
2. **DAMAGES.**—*Actions in Tort.*—*Scope of Recovery.*—In actions sounding in tort there may be a recovery for all damages which naturally and proximately result from the wrong done. p. 86.
3. **FRAUD.**—*Actions.*—*Exemplary Damages.*—In an action based on fraud, exemplary or punitive damages in addition to compensatory damages may be recovered. p. 86.
4. **APPEAL.**—*Review.*—*Instructions.*—*Fraud.*—*Measure of Damages.*—Where the jury, in an action for fraud in exchange of horses, found that the mare received by plaintiff was of no value at the time of the trade, but failed to find her value had she been as represented, it does not affirmatively appear that an erroneous instruction that the measure of damages was the difference between the value of the horses was harmless to defendants. p. 86.
5. **APPEAL.**—*Review.*—*Instructions.*—*Fraud.*—*Measure of Damages.*—*Erroneous Instruction.*—*Cure by Remittitur.*—On an appeal from a judgment for plaintiff in an action for fraud, reversal for an erroneous instruction as to the measure of damages cannot be avoided by remittitur of part of the amount recovered, where the record furnishes no definite basis for determining the amount, if any, which should be remitted. p. 87.
6. **FRAUD.**—*Fraudulent Representations.*—*Liability.*—*Intent.*—Where one assumes to know a material fact and states it as such to induce another to act, he is liable in damages to one acting thereon, and he cannot avoid liability by showing that he did not know such fact or intend the injurious consequences of the statement so made. p. 88.

From Marion Superior Court; *Linn D. Hay*, Judge.

Action by Jessie Robbins against Harry Mowes and another. From a judgment for plaintiff, the defendants appeal. *Reversed.*

Mowes v. Robbins—68 Ind. App. 82.

Carl Humble, for appellants.

Raymond F. Murray, for appellee.

FELT, J.—Appellee brought this suit to recover damages for fraud in a horse trade. The substance of the complaint shows that on February 19, 1915, appellants traded appellee a sorrel mare for a horse then owned by him; that appellants falsely and fraudulently represented said sorrel mare to be sound, but she was then and there diseased with “heaves,” which fact the defendants knew and concealed from appellee by the use of a drug; that plaintiff relied on the representation that the mare was sound, believed it to be true, and did not know that the mare was so diseased, and was thereby induced to give his said horse and five dollars in money for said mare; that said mare has continued to be so afflicted; that plaintiff was at the time of said trade a gardener, and bought said mare for work in that business, all of which was known to defendants; that said mare was and is wholly unfit for work because of said disease, and on account thereof plaintiff has been damaged in his said business in the sum of \$100; that he has been put to great expense in caring for and keeping said mare, all to his damage in the sum of \$400.

The complaint was answered by a general denial and by a special answer in which appellants alleged that they had owned the sorrel mare only two days, and did not know that she was diseased, nor did they conceal that fact from the plaintiff; that they informed him that they did not know whether she was or was not sound, and traded the mare on a day’s trial; that plaintiff agreed to return the mare on the

evening of the day the trade was made if not satisfactory, and he did not return her or offer so to do at any time. To the second paragraph of answer appellee filed a reply in general denial.

A trial by jury resulted in a verdict for plaintiff in the sum of \$146.25. Judgment was rendered on the verdict.

Appellants' motion for a new trial was overruled upon appellee's entering of record a remittitur in the sum of \$50 at the suggestion of the trial court.

The error relied on for reversal is the overruling of appellant's motion for a new trial. A new trial was asked on the ground that the verdict of the jury is not sustained by sufficient evidence, the damages are excessive, and error in the giving of certain instructions to the jury.

By instruction No. 7 the court informed the jury that, if they found for the plaintiff, the "measure of his damages would be the difference between the value of the horse plus \$5.00, if the plaintiff paid it to the defendants, and the value of the horse, if any, that the defendants traded to the plaintiff, plus any necessary expenses of keeping that horse caused by reason of the fraud perpetrated upon the defendants, in case you find for the plaintiff."

Appellants contend that this instruction is erroneous, in this, that it informed the jury that, in the case the plaintiff was entitled to recover, the measure of his damages was the difference between the value of the mare he obtained from appellants and the value of the horse and money he gave in exchange for such mare.

The complaint proceeds on the theory that appellee retained the sorrel mare and sued to recover the

damages sustained by reason of the fraudulent representations as to her value.

In this state, and generally, the rule for the measure of damages for fraud in the sale or exchange of property is the difference in the actual value

1. of the property received by the party alleged to have been defrauded and the value of such property at the time, had it been as represented to be by the vendor.

The law presumes that the purchaser has paid for the property as represented, and that he is entitled to his bargain, if it be a bargain, and in the absence of fraud must abide by the result, though he may have paid more for the property obtained than it was worth. *Booher v. Goldsborough* (1873), 44 Ind. 490, 503; *Nysewander v. Lowman* (1890), 124 Ind. 584, 589, 24 N. E. 355; *Williamson v. Brandenburg* (1892), 133 Ind. 594, 598, 32 N. E. 834; *Crist v. Jacoby* (1894), 10 Ind. App. 688, 690, 38 N. E. 543; *Brier v. Mankey* (1910), 47 Ind. App. 7, 12, 93 N. E. 672; 2 Sedgwick, *Damages* (9th ed.) §§762, 777; 20 Cyc 130-132.

The fundamental rule in assessing damages for breach of a contract or for a tort is that the injured party shall have fair and just compensation for the injury sustained. Circumstances may warrant the assessment of punitive or exemplary damages in tort cases. The damages recoverable in any case must be susceptible of ascertainment, and should not include elements that are uncertain, contingent, or speculative.

In tort cases the wrongdoer is liable for all damages which naturally and proximately result from

the wrong done. *Coy v. Indianapolis Gas Co.*

2. (1896), 146 Ind. 655, 663, 46 N. E. 17; *Cincinnati, etc., R. Co. v. Eaton* (1884), 94 Ind. 474, 479, 48 Am. Rep. 179; 8 R. C. L. §8, p. 431; 8 R. C. L. §23, p. 453.

The action here is based upon fraud, and the injured party in addition to compensatory damages may recover exemplary or punitive damages.

3. *Wheatcraft v. Myers* (1914), 57 Ind. App. 371, 374, 107 N. E. 81; 8 R. C. L. §§128-132, pp. 579-588. There was proof tending to show special damages, by way of expenses in having the mare examined by a veterinary surgeon, and for keeping her until the alleged fraud was discovered, aggregating about \$4.

The instruction is erroneous in its statement of the rule for the measure of damages as above shown, and is also somewhat ambiguous in referring to

1. "the fraud perpetrated upon the defendants,"
whereas the action is based upon fraud alleged to have been perpetrated by the defendants upon the plaintiff.

However, appellee contends that, even though the instruction be erroneous, the facts found by the jury in answer to interrogatories show that it was

4. not harmful to appellants. The jury returned a verdict for \$146.25, and the court conditioned the overruling of the motion for a new trial on appellee's entering a remittitur of \$50, which was done. The judgment therefore stands for \$96.25.

In answer to interrogatories the jury found that the mare appellee obtained was of no value at the time of the trade, and that the horse appellants obtained from him was worth \$75, and that appellee paid appellants \$5 in money.

The jury also found that the sorrel mare at the time of the trade was afflicted with "bull heaves," and that the defendants knew that fact at the time; that they concealed the fact from appellee with a sponge inserted in the nasal passages of the mare; that they represented to appellee that they knew that the mare was sound. There was also evidence tending to show that snuff had been placed in said sponge, and that appellee expended about \$4 for medical treatment and expense of keeping the mare before he ascertained the fraud that had been perpetrated upon him.

On these facts the jury was justified in assessing punitive as well as compensatory damages.

However, in order to ascertain the damages appellee was entitled to recover, on the theory of this case, it was necessary to prove the actual value of the sorrel mare at the time of the trade, and her value at the time had she been as represented by appellants. The jury found that the mare was of no value at the time of the trade, but failed to find her value had she been as represented. The record therefore fails to disclose one of the elements essential to the determination of the damages, if any, sustained by appellee.

We cannot therefore hold that the record affirmatively shows that the erroneous instruction was not harmful to appellants.

Appellee also suggests that, in case the court finds the instruction to be erroneous and harmful, a reversal may be avoided by entering a remittitur

5. of the excessive portion of the judgment. The facts of record afford no definite basis for determining the amount, if any, that should be remitted, and, in the absence of such facts, it would be a

matter of speculation or guessing to which the court may not resort to avoid a reversal.

Appellants also claim that instruction No. 4 is erroneous for not informing the jury that appellee, to recover, must prove the elements of intention, knowledge, and concealment on the part of appellants in relation to the alleged fraudulent representations.

The instruction in substance informed the jury that, if the defendants represented the horse to be sound, and the evidence proved that it was unsound by reason of the disease as alleged, and that plaintiff relied upon those representations, and was thereby induced to make the trade, they might find for the plaintiff, but, if such facts were not proved, they should find for defendants.

The instruction was not erroneous. It was based upon the proposition that, where a party assumes to know a material fact and states it as such, to

6. induce another to act, and he does rely and act thereon to his damage, the party who assumes to know, and states the proposition as a fact, cannot relieve himself from liability by showing that he did not know such fact or intend the injurious consequences of his statement so made. *Maywood Stock Farm v. Pratt* (1915), 60 Ind. App. 131, 110 N. E. 243, 246, and cases cited.

For the error in the instruction as to the measure of damages, the judgment is reversed, with instructions to the lower court to sustain appellants' motion for a new trial.

NOTE.—Reported in 120 N. E. 51. See under (1) 20 Cyc 132; (3) 20 Cyc 142; (6) 20 Cyc 27, 35. Fraud: measure of damages for fraudulent representations in sale or exchange of real estate, 8 L. R. A. (N. S.) 804, 16 L. R. A. (N. S.) 818; whether statements made without knowledge of falsity is ground for action for fraud, 18 L. R. A. (N. S.) 379.

Gibson v. City of Indianapolis—68 Ind. App. 89.

GIBSON v. CITY OF INDIANAPOLIS.

[No. 9,560. Filed June 25, 1918.]

1. **MUNICIPAL CORPORATIONS.—Parks.—River in Park.—Liability for Dangerous Condition.**—In an action against a city for the death of plaintiff's minor daughter, where the complaint alleged that, while boating at defendant's invitation on a stream contiguous to a public park, a small boat in which deceased was riding was overturned in a collision with a privately owned motor boat, and, after being thrown in the water, she was caught and held by a barbed wire in the stream and drowned, the negligence charged being that defendant carelessly permitted quantities of barbed wire to accumulate in the river bed and that it allowed the use of motorboats on the river, thereby endangering boaters and bathers, where there was no evidence to sustain the charge of negligence as to the use of motorboats or that the city had notice, actual or constructive, of the existence of the wire, and the evidence further showed that defendant exercised no control over the place where the accident occurred, except to police the stream, and the wire could not have been seen by the exercise of ordinary care by one doing police duty, a verdict for defendant is sustained by sufficient evidence. pp. 90, 92.
2. **APPEAL.—Review.—Verdict.—Conclusiveness.**—The jury's verdict is conclusive on appeal if there is any evidence to sustain it. p. 92.
3. **APPEAL.—Review.—Refusal of Instructions.**—The refusal of tendered instructions was not error, where they were substantially covered by proper instructions in so far as they were applicable. p. 92.
4. **TRIAL.—Instructions.—Failure to Request.**—Where plaintiff failed to request any further instruction on a phase of the case covered by an instruction which was good as far as it went, he cannot complain of the instruction given. p. 92.

From Marion Superior Court (97,753); *Theophilus J. Moll*, Judge.

Action by Charles C. Gibson against the city of Indianapolis. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

George W. Galvin, for appellant.

Gibson v. City of Indianapolis—68 Ind. App. 80.

Walter Meyers, William A. Pickens, Elmer W. Stout, Paul G. Davis and Russell J. Ryan, for appellee.

IBACH, J.—Appellant brought this action to recover damages for the loss of services of his minor daughter, who was drowned in White river, contiguous to Riverside Park in the city of Indianapolis. The questions presented challenge the correctness and sufficiency of the evidence to sustain the verdict and the giving or refusal to give certain instructions.

The gravamen of the negligence charged in the complaint is in brief that appellee held out said White river as a part of Riverside Park, and invited

1. persons to use the river for bathing and boating, and permitted high-powered motorboats to be used along and over said waters to the known peril of those boating thereon, and negligently and carelessly suffered obstructions to accumulate in the bed of the stream, among which were large quantities of barbed wire, which settled on the bed of the stream, which fact was well known to appellee; that appellee negligently and carelessly permitted appellant's daughter to go upon said water without warning of any danger or peril from the presence of high-powered motorboats and launches upon said waters, and negligently and carelessly permitted her to go upon said waters in the presence or danger of the submerged barbed wire without warning her of such danger; that appellant's daughter while upon said stream by invitation and without knowledge of such dangers was run upon, her boat overturned by one of the motorboats (recklessly and carelessly operated), and, being thrown into the water, was caught and held by the barbed wire therein and drowned.

There is evidence tending to show that the accident occurred approximately a quarter of a mile north of the Thirtieth street bridge in the city of Indianapolis and approximately twenty-five feet west of the east shore line, and about 800 feet north of the abutment of the old "Big Four" railroad bridge east of the center line or thread of the stream, upon property not owned or occupied by the city of Indianapolis for park purposes; that the barbed wire was not exposed to vision and could not have been discovered by the exercise of reasonable care of one policing the stream. There is an entire absence of any substantial evidence to sustain the charge of negligence with reference to the use of high-powered motorboats, viz., there is no evidence to show that such negligence was responsible for the accident.

Before the complaint can be sustained upon the theory that the existence of the barbed wire in the water was the proximate cause of the accident, it must first be shown that the city had actual knowledge of the presence of the barbed wire, or that it had been there long enough for the city to have had constructive notice. The uncontradicted evidence shows that the wire could not be seen, and there is no evidence as to the length of time it had been there.

Furthermore, the jury by their answers to interrogatories find that the city had no knowledge of the presence of barbed wire in the bed of White river at the point of the accident; that the wire was not in such position that it could have been seen by the exercise of ordinary care by one policing Riverside Park; that the boat in which appellant's daughter was riding at the time of her death was struck and overturned by a person operating a motorboat which

was kept and stored at the Emrichsville boathouse, which was off of the grounds of the defendant; that the defendant city at no time exercised any act or control over the place where the accident happened except to police the stream.

It is well settled that the verdict of the jury is conclusive if there is any evidence tending to sup-

2. port it. *Delaware, etc., Telephone Co. v. Fiske* (1907), 40 Ind. App. 348, 81 N. E. 1110; *Ohio Farmers Ins. Co. v. Vogel* (1905), 166 Ind. 239, 76 N. E. 977, 9 Ann. Cas. 91, 3 L. R. A. (N. S.) 966, 117 Am. St. 382.

Without setting out more of the evidence, it is apparent that appellant has wholly failed to

1. prove the material allegations of his complaint, and therefore the verdict of the jury is sustained by sufficient evidence, and is not contrary to law.

While the conclusion reached regarding the evidence in effect disposes of the case, it is earnestly urged that the court erred in refusing certain

3. instructions tendered by appellant and in giving certain instructions tendered by appellee and others of its own motion.

The instructions refused and objected to were substantially covered by other instructions given in so far as applicable to the facts of the case. The instructions given covered the issues and the evidence, and, when construed as a whole, were not open to the objections urged against them.

The use of the word "occupant" in the seventh instruction given by the court of its own motion is objected to. It does not appear that appellant

4. requested any further instruction on this phase

Williams v. Pittsburgh, etc., R. Co.—68 Ind. App. 93.

of the case, and for this reason is not in position to complain of an instruction good as far as it went.

Taking the instructions as a whole, the jury could not have been misled to the prejudice of appellant. Judgment affirmed.

NOTE.—Reported in 119 N. E. 1011. See under (1) 28 Cyc 1324.

WILLIAMS v. PITTSBURGH, CINCINNATI, CHICAGO AND
ST. LOUIS RAILWAY COMPANY.

[No. 9,473. Filed June 25, 1918.]

1. *APPEAL.—Record.—Instructions.*—Instructions not properly in the record will not be considered on appeal. p. 96.
2. *APPEAL.—Record.—Instructions.*—An entry, “and the court now instructs the jury to return a verdict in favor of the defendant, to the giving of which instruction the plaintiff excepts,” is not sufficient to make the instruction part of the record. p. 97.
3. *APPEAL.—Record.—Instructions.*—As the act of 1907, Acts 1907 p. 652, in amending the act of 1903, Acts 1903 p. 338, omits the proviso for making oral instructions a part of the record, an entry made in accordance with such proviso did not make an oral instruction part of the record. p. 97.
4. *APPEAL.—Record.—Instruction.—Copying into Motion for New Trial.*—Copying an oral instruction into a motion for new trial is not sufficient to make the instruction part of the record. p. 98.
5. *APPEAL.—Record.—Instructions.*—Whether an instruction is oral or written, there is no authority for making it part of the record at a succeeding term of court, more than seven months after trial, by an entry ordering that an instruction be made part of the record without a bill of exceptions, and reciting that it was the only instruction in the cause and that it had been dated and filed in open court after being signed by the court and having plaintiff's exception indorsed thereon. p. 98.
6. *APPEAL.—Record.—Instructions.—Peremptory.*—A peremptory instruction, to be reviewed on appeal, must be made a part of the record in the manner as other instructions, and it is not

Williams v. Pittsburgh, etc., R. Co.—68 Ind. App. 93.

sufficient that the record shows that the verdict was directed by the court. (*Davis v. Mercer Lumber Co.* [1904], 164 Ind. 413, distinguished.) p. 98.

7. **APPEAL.—Review.—Evidence.—Sufficiency.—Scope of Review.**—In determining the sufficiency of the evidence, the court on appeal will consider only the evidence tending to support the verdict. p. 99.
8. **CARRIERS.—Carriage of Live Stock.—Delay in Shipment.—Proof of Damages.**—In an action by a shipper against a railroad company for delay in transporting live stock, even though the evidence established unreasonable delay, the shipper could not recover where there was no evidence from which the actual damages sustained could be ascertained. p. 99.
9. **CARRIERS.—Carriage of Live Stock.—Delay in Shipment.—Measure of Damages.—Proof.**—The measure of damages for unreasonable delay in the shipment of live stock or goods, in the absence of a contract in that regard, is the difference between the market value at their destination when they should have arrived and the value at actual delivery, and, in an action to recover for delay in transporting a shipment of horses, the requirements of such rule are not satisfied by evidence showing the value of the horses when placed in the cars and their value on their arrival at the point of destination. p. 100.
10. **DAMAGES.—Evidence.—Question for Jury.**—A jury must be furnished data from which it can estimate the extent of damages, and where there is a failure in this regard there can be no recovery. p. 101.
11. **TRIAL.—Directing Verdict.**—It was proper to direct a verdict where there was no evidence on which the jury could have properly returned a verdict other than that rendered, and the trial court would have been compelled to set aside a different verdict as not sustained by the evidence. p. 101.
12. **APPEAL.—Review.—Harmless Error.—Failure to Assess Nominal Damages.**—A judgment will not be reversed for failure to assess nominal damages. p. 102.

From Lake Superior Court; *Charles E. Greenwald*, Judge.

Action by Philemus Williams against the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

Williams v. Pittsburgh, etc., R. Co.—68 Ind. App. 93.

Knight & Brown and J. Fred Masters, for appellant.

G. E. Ross, for appellee.

BATMAN, J.—This is an action by appellant to recover damages for the breach of a written contract with appellee for the shipment of certain horses from Crown Point, Indiana, to Winamac, Indiana. The complaint is in two paragraphs, and in each paragraph the breach is based on an alleged unreasonable delay in shipment under such contract. Appellee filed an answer in two paragraphs, the first being a general denial and the second an affirmative paragraph, in which it alleges that the contract in suit contained the following provision:

“That in the event of any unusual delay or detention of said live stock, caused by the negligence of the said carrier, or their employees, or otherwise, the said shipper agrees to accept as full compensation for all loss or damage sustained thereby, the amount actually expended by said shipper, in the purchase of food and water for the said stock while so detained.”

That in consideration of such provision for limited liability, appellant was given a reduced rate for such shipment, and that by reason of said provision of such contract appellant's damages, if any, are limited as therein provided. To this affirmative paragraph of answer appellant filed a reply, the nature of which is not disclosed by the record, but appellant states in his brief that it was a general denial. On the issues thus formed the cause was submitted to a jury for trial, and at the close of all the evidence the court instructed the jury to return a verdict for ap-

pellee, which was done, and judgment rendered accordingly. Appellant filed a motion for a new trial, which was overruled, and this action of the court is the sole error assigned and relied on for reversal. Appellant alleged as reasons for a new trial that the verdict is not sustained by sufficient evidence, and is contrary to law, and that the court erred in its instruction to the jury.

Appellee contends that the instruction given the jury is not made a part of the record, and hence no question is presented with reference thereto.

1. Instructions not properly in the record will not be considered on appeal. *Cronin v. Keesling* (1911), 50 Ind. App. 260, 98 N. E. 303. The jury was instructed on March 23, 1915. The only entry made with reference thereto at the time reads as follows: "And the court now instructs the jury to return a verdict in favor of the defendant, to the giving of which instruction the plaintiff excepts." On April 9, 1915, the following further entry was made: "The court's oral instruction to the jury is reduced to writing, dated, and plaintiff's written exception to the giving of the same is endorsed thereon, signed by the court, and filed with the Clerk; all of which is in these words and figures, to-wit: 'Gentlemen of the Jury, you are instructed by the court to return a verdict for the defendant.' This being the instruction given by the Hon. Charles Greenwald, Judge of the Lake Superior Court, sitting at Crown Point, Indiana, in the above entitled cause, the plaintiff does hereby except to the giving of said above instruction." On April 22, 1915, appellant filed a motion for a new trial, in which he alleged, as the fourth reason therefor, that the court erred in giving

the following instruction to the jury: "Gentlemen of the jury, you are instructed to find for the defendant." On November 5, 1915, the further entry was made: "Whereupon it is ordered by the court that all instructions and all exceptions to such be made a part of the record herein without a bill of exceptions, and they are in the following words and figures, to-wit: 'Gentlemen of the jury, you are instructed to find for the plaintiff,' to the giving of said instruction the plaintiff excepts. Said instruction is the only instruction whatever of any kind in said cause and it was entered by the court on his docket with plaintiff's exception to the giving thereof immediately before it was given to the jury, March 23rd, 1915, and is in Order Book No. 2, page 243, and was later also reduced to writing by the plaintiff on April 9th, 1915, and signed by the court, plaintiff's exception indorsed thereon, dated and filed in open court." These are the only entries relating to the instruction given the jury.

It will be noted that there is no attempt to make the instruction in question a part of the record by a bill of exception. The entry, made at the time

2. the instruction was given, does not disclose whether it was written or oral, but it is not sufficient to make the instruction part of the
3. record in either event. Appellant evidently recognized this fact, and sought to make the instruction a part of the record by the subsequent entries. The entry of April 9, 1915, states that the instruction was oral, and appellant evidently sought thereby to have it made a part of the record in accordance with §1 of the act of March 9, 1903, Acts 1903 p. 338. This section, however, was amended in

1907. In the amended section the provision for making an oral instruction a part of the record in such manner is omitted. Acts 1907 p. 652, §561 Burns 1914. This entry therefore did not serve to bring the instruction into the record. Appellant's

4. effort to make the same a part of the record by copying the same into his motion for a new trial was likewise unavailing. *Wood, Exr., v. Matlock* (1897), 19 Ind. App. 364, 48 N. E. 384; *Raper v. American Tin-Plate Co.* (1900), 156 Ind. 323, 59 N. E. 937.

It will be observed that the last entry with reference to the instruction in question was made at a succeeding term of court, more than seven

5. months after the trial of the cause. There is no authority for making an instruction a part of the record in this manner, whether it be a

6. written or oral instruction. But appellant contends in effect that, inasmuch as the court instructed the jury to return a verdict for appellee, it is not necessary that the instruction appear formally in the record, but it is sufficient if the record shows that the verdict was directed by the court. The following decisions are against this contention. *Raper v. American Tin-Plate Co., supra*; *Kirklin v. Clark* (1912), 53 Ind. App. 358, 101 N. E. 753; *Cronin v. Keesling, supra*. In the latter case, however, this court inadvertently held that an oral instruction could be made a part of the record by having it reduced to writing, signed by the judge, and filed with the clerk before the close of the term, under §561 Burns 1908, *supra*. An examination of said section discloses that it does not so provide, but that it supersedes a section that contained such a provision.

Appellant relies on the case of *Davis v. Mercer Lumber Co.* (1904), 164 Ind. 413, 73 N. E. 899, to support his contention. In that case the question involved related to the sufficiency of a bill of exceptions with reference to the giving of an instruction directing a verdict, rather than the necessity of making such an instruction a part of the record. In that case the bill of exceptions disclosed what directions the court gave with reference to returning a verdict and the court held the same sufficient. That was a different question from the one presented in this case, and does not sustain appellant's contention. We conclude the instruction in question is not in the record, and therefore cannot be considered.

The only remaining reasons on which appellant bases his right to a new trial are that the verdict is not sustained by sufficient evidence, and is con-

7. trary to law. The only attempt to support these reasons under propositions and points, as required by clause 5 of Rule 22, governing the preparation of briefs, consists of their restatement, followed by certain facts on which it is claimed there was evidence, and a citation of authorities. These facts go to the questions of unreasonable delay in shipment and the damages sustained thereby, but no pages or lines of the record are given where the evidence to support the same may be found. It is well settled that in considering the sufficiency of the evidence in this court, only the evidence which tends to support the verdict will be considered. *Monongahela River, etc., Coke Co. v. Walts* (1913),

8. 56 Ind. App. 235, 105 N. E. 160. When this is done in the instant case, it cannot be said that the evidence shows an unreasonable delay in ship-

ment. But if the undisputed evidence had established unreasonable delay, and it be conceded that the provision set up in appellant's second paragraph of answer is invalid, as appellant contends, still he would not be entitled to recover for the reason that there is no evidence from which the actual damages sustained could be ascertained. The measure of dam-

ages for unreasonable delay in the shipment

9. of goods or live stock, in the absence of a contract in that regard, is the difference between the market value at their destination when they should have arrived and the value at actual delivery. *Cleveland, etc., R. Co. v. Rudy* (1909), 173 Ind. 181, 89 N. E. 951; *Pittsburgh, etc., R. Co. v. Knox* (1911), 177 Ind. 344, 98 N. E. 295; *Pittsburgh, etc., R. Co. v. Wood* (1909), 45 Ind. App. 1, 84 N. E. 1009, 88 N. E. 709. In this case there was no evidence as to what the market value of such horses would have been at their destination, had there been no unreasonable delay, and hence there was no evidence from which the jury could have determined such damages. The only evidence in the record on the question of the amount of damages sustained by reason of such delay relates to the value of the horses at Crown Point at the time of their loading and their value at Winamac on their arrival. It is evident that appellant proceeded upon the theory that this difference in value was the proper measure of damages, but such is not the case. One of the elements of damages made prominent by the evidence was the fact that, when the horses were loaded at Crown Point, they had been fed for the market and were in a good salable condition; that they had been groomed until their hair was sleek and made a good appearance; that when they reached

Winamac they had lost flesh and had shrunk in weight; that their hair was turned up and they looked rough; that they were gaunt and made a bad appearance. It is evident that a portion of this changed condition, and possibly the greater portion thereof, would necessarily have occurred, even if said shipment had been made without the alleged unreasonable delay, and to that extent such damage would not be chargeable to appellee. Under the evidence submitted, the entire damage to such stock from the point of shipment to the point of destination is combined under one estimate, and there was no means given the jury by which it could separate the same. It could therefore only speculate in that regard, which the law forbids. It has been decided by

10. this court, and correctly so we believe, that a jury must be furnished data from which it can estimate the extent of the damages in question, and where there is a failure in this regard there can be no recovery. *Green v. Macy* (1905), 36 Ind. App. 560, 76 N. E. 264. As said in the case of *Connersville Wagon Co. v. McFarlan Carriage Co.* (1905), 166 Ind. 123, 130, 76 N. E. 294, 3 L. R. A. (N. S.) 709: "A person who would recover damages must show with that reasonable certainty required by law the nature and extent of his damages." A consideration

11. of the record leads us to conclude that there is no evidence on which the jury could have properly returned a verdict for appellant for substantial damages, and that, if such a verdict had been returned, the trial court on application would have been compelled to set it aside as not sustained by the evidence. Under such circumstances it was proper for the court to direct a verdict in favor of

appellee. *Oleson v. Lake Shore, etc., R. Co.* (1896), 143 Ind. 405, 42 N. E. 736, 32 L. R. A. 149; *Cleveland, etc., R. Co. v. Heath* (1898), 22 Ind. App. 47, 53 N. E. 198; *Gipe v. Pittsburgh, etc., R. Co.* (1907), 41 Ind. App. 156, 82 N. E. 471; *Westfall v. Wait* (1905), 165 Ind. 353, 73 N. E. 1089, 6 Ann. Cas. 788. But should

it be contended and conceded that there was

12. evidence authorizing the assessment of nominal damages, the result must be the same, as this court will not reverse a judgment for failure to assess such damages. *Green v. Macy, supra*; *Woodhouse v. Powles* (1906), 43 Wash. 617, 86 Pac. 1063, 8 L. R. A. (N. S.) 783, 117 Am. St. 1079, 11 Ann. Cas. 54.

We find no reversible error in the record. Judgment affirmed.

NOTE.—Reported in 120 N. E. 46. See under (8) 10 C. J. 309; (11) 38 Cyc 1570.

MOORE v. MCCLAIN ET AL.

[No. 9,493. Filed April 12, 1918. Rehearing denied June 25, 1918.]

1. TRUSTS.—*Constructive Trusts*.—The court cannot construct a trust where the misconduct amounts merely to a breach of contract to convey, where there was no fraud or undue influence connected with the transaction in its inception. p. 108.
2. MORTGAGES.—*Action to Have Deed Declared a Mortgage*.—*Evidence*.—*Sufficiency*.—In an action to have a deed declared a mortgage and to quiet title, evidence held sufficient to sustain a finding that the instrument was a deed and not a mortgage. pp. 109, 110.
3. MORTGAGES.—*Absolute Deed*.—*Character of Instrument*.—*Evidence*.—*Promise to Pay Debt*.—On ascertaining whether an absolute deed to one discharging indebtedness on the land conveyed is a mortgage, although the absence of a promise to repay the

grantee at any specified time is not conclusive, it is a circumstance more favorable to the grantee than to the grantor. p. 110.

4. **MORTGAGES.—Conditional Sales.—Enforcement.**—While courts are inclined to regard a transaction as a mortgage rather than a conditional sale, yet when the contract on its face shows a conditional sale and there are no facts explaining or contradicting its terms, it will be carried into execution. p. 110.

5. **MORTGAGES.—Absolute Deed.—Option to Repurchase.**—In an action to have an absolute deed declared a mortgage, evidence showing that grantor had an option to repurchase the land conveyed within a certain period is insufficient upon which to declare the deed a mortgage. p. 110.

From Marion Circuit Court (23,353); *Louis B. Ewbank*, Judge.

Action by John F. Moore against William T. McClain and another. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

George T. Pattison, Means & Bunting, Alfred R. Hovey and J. J. M. LaFollette, for appellant.

Emsley W. Johnson and Joseph W. Hutchinson, for appellees.

IBACH, C. J.—The complaint in this case is in three paragraphs, the first, which is in the usual form of a suit to quiet title under §1116 Burns 1914, §1070 R. S. 1881, is not now relied upon and need not be given consideration. The second and third paragraphs proceed upon the theory of an equitable ownership of certain lands described in a warranty deed executed by appellant, and it is sought to have such deed declared a mortgage and upon the payment of the amount found due appellee thereon that appellant's title to the lands described be quieted in him.

The substance of certain averments of each of these paragraphs which become material to the disposition of this appeal, are: The defendant Wm. T. McClain

had, as administrator of the estate of Sarah A. Moore, deceased, appellant's mother, settled the same. Prior to April 7, 1900, plaintiff (appellant) had purchased of the several heirs their interest in and to said real estate and had assumed all incumbrances thereon. That said land had been ordered sold to pay debts of said estate, and that defendant (appellee) had as administrator proposed to furnish a sufficient amount of money to plaintiff to meet said obligations, the amount of which was ascertained to be \$1,500. On said date plaintiff conveyed said real estate by a deed absolute on its face to defendant. Said deed was intended by the parties and was in fact a mortgage given to secure the repayment of said \$1,500 to defendant, and being the money advanced by him to pay the debts of the said Moore estate and prevent a sale of the lands.

It may be noted here that there are no other averments in either paragraph of the complaint from which it might be contended that the complaint proceeds upon the theory that the deed was obtained by fraud or undue influence, except the averments that appellee obtained title to the particular lands while he was administrator of an estate in which they were involved. On the other hand, there are averments to be found in each paragraph which would indicate that it proceeded upon the theory that such deed was fairly obtained, but that the defendant refused to perform the agreement made when the deed was executed that he would reconvey when the amount found due was paid by plaintiff.

Appellee answered the complaint by general denial. A trial by the court resulted in a finding and judgment in his favor.

It is from this judgment, over appellant's motion for a new trial, that the appeal is taken.

The only error assigned and relied on for a reversal is predicated on the overruling of the motion for a new trial, and the causes argued are that the decision of the court is not sustained by sufficient evidence and is contrary to law.

The contention of appellant seems to be that the conveyance in form of a deed absolute on its face was in fact a mortgage to secure a loan, and that in equity it should be so declared, while it is insisted by appellee that his deed was absolute, and that an agreement which was made to reconvey the land constituted a conditional sale of which appellant did not avail himself, and therefore he is not entitled to relief.

At the beginning of the trial the parties stipulated as follows: On November 3, 1898, Sarah A. Moore was the owner of the real estate described in the complaint. On that day she died intestate, leaving surviving her as sole heirs at law the plaintiff and his two brothers. On November 23, 1898, defendant William C. McClain was appointed and qualified as administrator of said decedent's estate and continued to serve as such administrator until January 27, 1900, when he was discharged. While in life Sarah A. Moore had executed two mortgages on said land, one to the State of Indiana for \$700 and interest at six per cent., and another for \$450 with same interest to Isabelle Wilson. At the time of decedent's death there was due \$84 and interest on the school fund mortgage and \$54 interest on the Wilson mortgage. On August 8, 1899, the former husband of decedent and plaintiff's two brothers deeded to plaintiff their interest in the lands involved. On April 7,

1900, plaintiff executed and delivered to defendant William McClain a deed to the said lands for the consideration of \$1,500, and the deed was recorded May 18, 1900. McClain paid the school fund mortgage amounting to \$826 and the Wilson mortgage of \$531, both of which were released of record. The evidence further shows that the lands were described as a thirty-acre tract, valued when the deed was executed at from \$50 to \$100 per acre. Outside of the deed and certain letters which passed between the parties, the evidence was oral and in the main conflicting. Appellant's further evidence tended to show that when the deed was executed appellee agreed to convey the same lands to him whenever the total sum paid by appellee above the amount received by him from the use of the lands was repaid, and that appellee agreed not to sell the land, but that he would hold it and reconvey whenever it was so redeemed. This is denied by appellee, who claims that he told appellant that if he ever concluded to sell he (appellant) should have the refusal.

Appellee also testified that after appellant had possession of the farm for several months, after his mother's death and before her estate was settled, he came to appellee and stated in substance that he would be unable to pay the interest on the loans, much less the principal, and have anything left to pay the expenses of obtaining an education, and wanted appellee to take it off his hands.

At that time appellant stated further: "One reason I want you to take it is I believe you will give me an opportunity to buy it back some time if I am ever able. Perhaps some of the others, if they got it through a foreclosure of a mortgage would deprive

me of that privilege." There is also evidence that on petition to sell the land at administrator's sale to pay debts the land was appraised at \$1,350. Appellee had solicited bidders, but was unable to obtain any.

There is ample evidence, also, from which the court could, and doubtless did, conclude that appellee did not possess or exert any improper influence over appellant and did not take any unfair advantage of him in the whole course of the transaction; but appellant insists that the trial court should have taken the contrary view, because the presumption must obtain that an unfair and unjust advantage was taken of appellant because of the peculiar confidential relations which existed between the parties, and relies on that principle of law which has been announced by the courts in the following or similar language: If one obtains the legal title to property by virtue of confidential relations and influence under such circumstances that he ought not according to the rules of equity and good conscience retain the benefits thus acquired, a court of equity in order to administer complete justice between the parties, will raise a trust by construction out of such circumstances and relations, the execution of which will be enforced. *Huffman v. Huffman* (1905), 35 Ind. App. 643, 645, 73 N. E. 1096; *Donlon v. Maley* (1915), 60 Ind. App. 25, 110 N. E. 92; *Vanderpool v. Vanderpool* (1915), 163 Ky. 742, 174 S. W. 727, 729.

Another principle akin to the foregoing, and which appellant also contends is controlling here, has been very clearly stated recently by our Supreme Court in the following language: "There are certain legal and domestic relations in respect to which the law

raises a presumption of trust and confidence on one side and a corresponding influence on the other.

* * * Where such a relation exists between two persons, and the one occupying the superior position has dealt with the other in such a way as to obtain a substantial advantage, the law will presume that an improper influence was exerted, and that the transaction is fraudulent. *Westphal v. Williams* (1914), (Ind.) 107 N. E. 91, 93.

While the doctrine announced in these cases is well grounded and should always be applied in proper cases, it cannot be applied unless the evidence

1. is sufficient to show actual or constructive fraud. In other words, the fraud out of which the court can construct a trust must be at the inception of the transaction. The court cannot construct a trust where the misconduct amounts simply to a breach of the contract to convey where there was no fraud or undue influence connected with the transaction in its inception. *Westphal v. Williams, supra*; *Alexander v. Spaulding* (1902), 160 Ind. 176, 181, 66 N. E. 694.

In *Westphal v. Williams, supra*, the Supreme Court, in applying §4012 Burns 1914, §2969 R. S. 1881, announced the universal holding of the courts to be that an express parol trust cannot be impressed upon lands conveyed by deed absolute on its face, but that: "Constructive trusts do not fall within the provisions of this statute, but are excluded therefrom by the exception of such trusts as may arise by implication of law. A constructive trust arises in cases where the transaction involved is tainted by fraud, actual or constructive. * * * In such cases the court does not act upon and enforce parol agree-

ments to hold land in trust as the primary thing. It is the fraud or undue influence connected with the original transaction which justifies the court in constructing a trust and holding the wrongdoer responsible as a trustee maleficio."

It follows that appellant's claim must finally rest on the single proposition that the instrument in question is a mortgage and was so intended

2. when made. We might agree with appellant that there are circumstances and some testimony from which the court might have inferred that the instrument was a mortgage, i. e., that by reason of their relationship appellee and appellant did not deal at arm's length; that there was an existing debt and that this instrument was executed to secure it; that the parties intended the deed in question as a mortgage and so understood it at the time of its execution; that the consideration paid was inadequate. But that is not the question here. We are required to take the evidence most favorable to appellee, and from that to say that the only conclusion that can be legally drawn is that the instrument is a mortgage, if we would sustain appellant's contention. Is the evidence such as to require this? We think not. There is no evidence of any substantial merit to show that appellant was misled in any way in regard to the value of the land, or that he did not fully understand the transaction and transfer at the time it was made. The evidence shows that the debt spoken of was not a debt due appellee, but was a debt due from the estate he was administering to third persons. It also shows that the indebtedness was in excess of the then value of the land, which was appraised just prior to its transfer to appellee at \$1,350, and the indebtedness of

the estate amounted to \$1,492. It further appears that there was no promise to repay appellee at any specific time the amount paid by him in settling such indebtedness. It is true that the absence of a promise is not conclusive, but it is a circumstance more favorable to appellee than appellant (*Davis v. Stonestreet* [1853], 4 Ind. 101), and when taken with all the other circumstances in the case fully warranted the court in finding that the instrument was a deed rather than a mortgage.

Appellant concedes, and such seems to be the law, that every case of this kind must be determined according to the circumstances surrounding it. *Wolfe v. McMillan* (1889), 117 Ind. 587, 590, 20 N. E. 509.

It is settled law that while courts are inclined to regard a transaction as a mortgage rather than a conditional sale, when the contract on its face shows a conditional sale and there are no facts explaining or contradicting its terms, the courts will carry it into execution. *Hays v. Carr, Admr.* (1882), 83 Ind. 275, 284.

The view which may be taken of the evidence most favorable to appellant is that he had the privilege or option to repurchase the land within five years for a sum to be arrived at by computation which would wholly reimburse appellee. If such was an undisputed fact, still it would not be sufficient upon which to declare the deed a mortgage. *Hays v. Carr, Admr., supra; Rogers v. Beach* (1888), 115 Ind. 413, 415, 17 N. E. 609.

Regardless of the option, whether as stated by appellant or by appellee, appellant never availed himself of it, but shortly after the deed was executed purchased other lands in another county and never attempted to gain title to these lands

until more than fourteen years had passed, during which time appellee cultivated the lands and made numerous repairs and improvements. During all these years, according to appellant's testimony, he made no claim to the land except a single conversation which he testified took place at Franklin. This conversation was denied by appellee. This was all that was done by appellee to indicate in the slightest degree that he understood that the deed executed by him was a mortgage.

When the circumstances enumerated are taken together with the evidence of appellee as to the true character of the transaction, we cannot say that the decision of the court is not sustained by sufficient evidence. The weight of the evidence was for the trial court, and the principles of law applicable to the facts proved have been properly applied.

Judgment affirmed.

NOTE.—Reported in 119 N. E. 258. See under (1) 39 Cyc 178; (2) 27 Cyc 1024, 1025; (3) 27 Cyc 1008. Trusts: grantee's oral agreement with grantor to hold in trust as giving rise to constructive trust, 39 L. R. A. (N. S.) 906.

DOUGLASS v. RIGHTS.

[No. 9,616. Filed June 25, 1918.]

1. MUNICIPAL CORPORATIONS.—*City Engineer.—Term of Office.—Removal.—Power of Mayor.*—As the term of office of the city civil engineer is not declared by the Constitution or statute, he, under Art. 15, §2, of the Constitution of Indiana, holds office during the pleasure of the mayor, by whom, under §§8695, 8682 Burns 1914, Acts 1905 p. 219, §§92, 80, he is appointed and may be removed. p. 118.
2. MUNICIPAL CORPORATIONS.—*City Engineer.—Payment of Salary.*

Douglass v. Rights—68 Ind. App. 111.

—*Approval of Bond.*—The mere failure of an appointee to the office of city civil engineer to have his bond approved by the common council, as required by §8695 Burns 1914, Acts 1905 p. 219, §92, is not a sufficient reason for refusing to pay his salary, especially where the only objection is from one previously holding the office, who had been removed and showed no right to the office. p. 118.

From Jackson Circuit Court; *Oren O. Swails*, Judge.

Action by William H. Rights against the city of Seymour which interpleaded Elias B. Douglass! From a judgment for plaintiff, Douglass appeals. *Affirmed.*

F. W. Wesner, T. M. Honan and Edward P. Elsner, for appellant.

Montgomery & Montgomery, for appellees.

FELT, P. J.—Appellee, William H. Rights, instituted suit against the city of Seymour, Indiana, to recover \$262.50 alleged to be due him for salary as city civil engineer of said city.

The city appeared to the action and filed an answer or interpleader, in which it admitted that it owed the sum aforesaid as salary for the city civil engineer, but also alleged that appellant, Douglass, claimed to be such engineer, and had demanded payment of the salary in the sum aforesaid, asked leave to pay the sum into court for the benefit of the party entitled thereto, and that appellant be substituted in its place as a party to the suit and that it be discharged from further liability on account of such salary.

Thereupon all the parties duly appeared to said pleading, and the court examined said interpleader, heard the evidence thereon, and found the allegation thereof to be true, and that the sum aforesaid had

been paid into court, and that said Douglass should be made a party defendant to the suit, and thereupon entered an order as follows: "It is therefore ordered by the court that the said E. B. Douglass, be and he is hereby substituted as defendant in this action in place of said city of Seymour, Indiana, defendant above named; and that said city of Seymour, Indiana, be and is hereby discharged from all liability therefor to the said plaintiff, William H. Rights, or the said E. B. Douglass."

Thereafter said Douglass filed answer to the complaint in five paragraphs, and also filed a cross-complaint against both of the appellees in which he sought to recover the salary aforesaid from the city of Seymour. Demurrers were sustained to the third, fourth and fifth paragraphs of the answer of Douglass to the complaint.

The first paragraph of answer was a general denial, and the second alleges in substance the appointment, oath of office and bond of appellant, and likewise the performance of the duties of the office by him. Appellee Rights filed a reply in general denial to the second paragraph of answer aforesaid, and also an answer of general denial to appellant's cross-complaint.

Upon request the court made a special finding of facts, and stated its conclusions of law thereon in substance as follows:

Finding of Facts.

(1) The city of Seymour is a city of the fifth class, and John A. Ross was at the time involved in this controversy the duly elected, qualified and acting mayor of said city.

“(2) That Elias B. Douglass during said time was a resident of the county of Jackson in said state and was a civil engineer and on January the 5th, 1914, said John A. Ross, as such Mayor, appointed said Douglass as civil engineer of said city of Seymour and thereupon said Douglass filed his bond as such engineer in the penal sum of \$1,000.00 with surety thereon and that the penalty of such bond had been theretofore fixed by the Common Council of said city by ordinance and said Douglass subscribed and took the oath of office required by law as such engineer and entered upon the discharge of his duties as such and continued therein until the 14th day of August, 1915.

“(3) That on the 14th day of August, 1915, said John A. Ross, as such Mayor, intending to discharge said Elias B. Douglass from his office as such engineer caused to be delivered to him the following writing, to-wit:

“Seymour, Indiana, August 14, 1915.

“Mr. William Douglass,

“Seymour, Indiana.

“Dear Sir:—You will recall I asked for your resignation two weeks ago and renewed the request at the last council meeting night, adding I would assign my reasons if you so desired any time you might call at my office. You have not called, neither have you sent in resignation. I am accordingly under compulsion of informing you that you are this day dismissed from service as Civil Engineer of the City of Seymour, Indiana.

“Very truly yours,

“John A. Ross, Mayor.”

That afterwards at the next regular meeting of the common council of said city, to wit, on August 19, 1915, said John A. Ross, as such mayor, read to said common council the following writing, to wit:

“To the Honorable Council of the City of Seymour, Ind.:

“August 14, 1915.

“Dear Sirs:—I have this day dismissed E. B. Douglass from the office of Civil Engineer for lack of either qualifications or will, or possibly both, to perform the duties of that office.

“Detailed specifications will be furnished on demand.

“John A. Ross, Mayor.

“(4) That the plaintiff William H. Rights, is and was during the time aforesaid a Civil Engineer, and that on August 23rd, 1915, said John A. Ross as such Mayor, appointed him as Civil Engineer of said City of Seymour, and thereupon said Rights filed his bond in the penal sum of \$1,000.00 with surety thereon, which bond and surety was approved by said Mayor, but said bond was never submitted to said council by said Mayor either for approval or disapproval, and no action with reference to same was taken by said council, and thereupon said Rights took and subscribed the oath required by law as such City Civil Engineer.

“(5) That after the 14th day of August, 1915, said Mayor removed part of the individual property of said Douglass from the office in the City Building theretofore occupied by him as City Civil Engineer and locked said office against him and turned the key and possession of the same over to the plaintiff, Wil-

liam H. Rights, who since said date has held and occupied said room and office.”

“(6) The salary of the city civil engineer was \$900 per year, payable in bimonthly installments.

“(7) That since the 14th day of August, 1915, said Elias B. Douglass, and since the 23rd day of August, 1915, said William H. Rights, each regularly attended meetings of the Common Council, held himself in readiness to perform the duties required of him as such City Civil Engineer and each bimonthly demanded of said city, payment of his salary as fixed above as such engineer, but voucher for the same was refused by the clerk of said city and no payment thereon has been made, and both the plaintiff and defendant Douglass during such time have claimed to be the duly appointed, qualified and acting Civil Engineer of said city.

“(8) That at the time of the filing of this suit there was owing as salary, either to the plaintiff, William H. Rights, or defendant, Elias B. Douglass, as such Civil Engineer the sum of \$262.50 and the defendant city has brought said amount into court for the use of the party the court may find upon the foregoing facts legally entitled to the same.”

Conclusions of Law..

“The law is with the plaintiff, William H. Rights, and he is entitled to recover in this action the sum of \$262.50.”

Appellant excepted to the conclusions of law. Judgment was rendered against the city of Seymour for the \$262.50, and against both defendants for costs.

Appellant has assigned as error that the court erred in sustaining the demurrer of appellee Rights

to the third, fourth, and fifth paragraphs of answer to the complaint; error in the conclusions of law and in overruling his motion for a new trial.

Appellee contends that the judgment must be affirmed: (1) Because the briefs fail to duly present any questions under the rules of the court; (2) because the undisputed facts show that appellant was duly discharged from the office of city civil engineer in substantial compliance with the statute which authorized such dismissal; (3) because appellant is not a proper party to this suit, and because the right or title to said office cannot be put in issue and determined in this action, and must be determined, if at all, by a proceeding in *quo warranto*; and (4) there is no judgment against appellant from which he can appeal.

The briefs of appellant are sufficient to enable the court to pass upon the correctness of the conclusions of law, and, as this involves the questions upon which the appeal must ultimately be determined, the other contentions need not be considered in detail.

Section 2 of Art. 15 (§224 Burns 1914) of the Indiana Constitution provides that: "When the duration of any office is not provided for by this Constitution, it may be declared by law; and if not so declared, such office shall be held during the pleasure of the authority making the appointment."

Section 8695 Burns 1914, Acts 1905 p. 219, provides that: "The mayor shall appoint a city civil engineer who shall be subject to the direction of the board of public works, except in cities of the fifth class, where he shall be subject to the orders of the common council. * * * The amount of his bond to be approved by the common council * * *. If a

satisfactory engineer does not reside in said city or town then an engineer may be appointed from outside of said corporation.”

Section 8682 of the said statute provides that it shall be the duty of the mayor: “Seventh. To appoint the heads of departments, as hereinafter created, in cities of the first, second, third and fourth classes, and to appoint, in cities of the fifth class, a fire marshal, chief of the fire force and street commissioner, all of which appointees shall hold office until their successors are appointed and qualified; and he shall make such other appointments as may be provided by law or by the ordinances of any city: Provided, That the mayor may at any time suspend or remove from office any or all of such heads of departments or other persons, whether appointed by him or by any of his predecessors, by notifying them to that effect and sending a message to the council stating in writing his reasons for such removal.”

Appellant was appointed by the mayor, held the office of city civil engineer during the pleasure of the mayor, and was removed in substantial com-

1. pliance with the statute. *State, ex rel. v. Curtis* (1913), 180 Ind. 191, 193, 102 N. E. 827; *Roth v. State, ex rel.* (1901), 158 Ind. 242, 262, 263, 63 N. E. 460; *State, ex rel. v. Mayne* (1879), 68 Ind. 285, 296; *City of Madison v. Korbly* (1869), 32 Ind. 74, 78; *Mechem, Public Officers* §445 *et seq.*

Appellee Rights is shown to have held an appointment by the mayor in due form, to have taken the oath of office as city civil engineer and to have

2. executed a bond and delivered the same to the mayor. He was also in possession of the office and at all times ready to discharge the duties of his office. The mere failure to have his bond acted upon

by the common council, though an irregularity, was not a sufficient reason for refusing the payment of his salary. This is especially true in this case, since the only objection thereto comes from appellant and not from the city. The latter conceded its liability for the amount and sought only to be safeguarded in making the payment.

Conceding, without deciding, appellant's right to litigate the question of his right to the office in this suit, his failure to establish his right and title to the office, removes the only objection interposed to the payment of the salary to appellee, Rights, and authorized the conclusions of law stated by the trial court. *Leonard v. City of Terre Haute* (1911), 48 Ind. App. 104, 111, 114, 93 N. E. 872; *Mechem, Public Officers* §§315-322; *Hiday v. State, ex rel.* (1916), 64 Ind. App. 159, 115 N. E. 601; *Howard v. Burke* (1911), 248 Ill. 224, 93 N. E. 775, 777, 140 Am. St. 159; *City of Terre Haute v. Burns* (1918), 69 Ind. App. 7, 116 N. E. 604, 607, and cases cited; *State, ex rel. v. Milne* (1893), 36 Neb. 301, 54 N. W. 521, 19 L. R. A. 689, 691, 38 Am. St. 724; *Stearns v. Sims* (1909), 24 Okla. 623, 104 Pac. 44, 24 L. R. A. (N. S.) 475, 477.

The foregoing propositions compel the affirmance of the judgment of the lower court. But as to the proposition of trying the question of the title to the office in this proceeding, see *Leonard v. City of Terre Haute, supra*; *City of Terre Haute v. Burns, supra*; *Griebel v. State, ex rel.* (1887), 111 Ind. 369, 372, 12 N. E. 700; *Parsons v. Durand* (1897), 150 Ind. 203, 204, 49 N. E. 1047; *Carmel Nat. Gas, etc., Co. v. Small* (1897), 150 Ind. 427, 429, 47 N. E. 11, 50 N. E. 476.

Judgment affirmed.

NOTE.—Reported in 119 N. E. 1017. See under (1, 2) 28 Cyc 583.

Vandalia R. Co. v. Fort Wayne, etc., Traction Co.—68 Ind. App. 120.

VANDALIA RAILROAD COMPANY v. FORT WAYNE AND
NORTHERN INDIANA TRACTION COMPANY.

[No. 9,550. Filed February 26, 1918. Rehearing denied June 25, 1918.]

1. **RAILROADS.—Regulation.—Crossings.—Police Power.**—The public has a vital interest in the proper maintenance of street railway crossings over railroads, and statutory regulation of the establishment and the maintenance of such crossings fall within the police power of the state. p. 128.
2. **RAILROADS.—Crossing other Railroads.—Contracts.—Public Policy.—Statutes.**—Sections 5676, 5677 Burns 1914, Acts 1901 p. 461, §§2, 3, as to the expense of the establishment of the crossing of a street railroad over the tracks of other railroads, and the subsequent maintenance of such crossings, in effect declare the public policy of the state to be against leaving open to contract, speculation or controversy, the question of who shall make necessary repairs to such crossings, or charged with the duty of maintaining and keeping in repair its own tracks. p. 129.
3. **STREET RAILROADS.—Use of Streets.—Easement.—Scope.**—A street or interurban railroad laid upon a public street by permission of the proper municipal authorities does not constitute an additional burden or servitude, but is within the uses legally contemplated by the grant of the easement. p. 129.
4. **RAILROADS.—Crossing other Railroads.—Agreement.—Validity.—Public Policy.—Consideration.—Statutes.**—A contract under the terms of which defendant railway granted to plaintiff street railway a right to forever maintain a single track across the tracks and right of way of defendant in consideration that plaintiff maintain the necessary crossings at its own expense, is invalid as against public policy, and in violation of §§5676, 5677 Burns 1914, Acts 1901 p. 461, §§2, 3, as to the expense of the establishment of such crossing and their subsequent maintenance; and such contract was unenforceable as not being supported by any sufficient consideration, since plaintiff already had the right, regardless of the contract, of crossing the tracks of defendant railroad. pp. 130, 131.
5. **CONTRACTS.—Valuable Consideration.**—The mere withdrawal of an objection which there is no legal right to interpose, or consent given to do something which may be legally done without such consent, does not afford a sufficient consideration to support a contract. p. 130.

Vandalia R. Co. v. Fort Wayne, etc., Traction Co.—68 Ind. App. 120.

From Allen Circuit Court; *John W. Eggeman*, Judge.

Action by the Fort Wayne and Northern Indiana Traction Company against the Vandalia Railroad Company and another. From a judgment for plaintiff, the named defendant appeals. *Affirmed*.

Samuel Parker, D. P. Williams, W. G. Crabill and S. J. Crumpacker, for appellant.

Barrett, Morris & Hoffman, for appellee.

FELT, J.—Appellee brought this suit against appellant to recover one-half the cost of renewing certain highway crossings where the tracks of said companies crossed each other in the city of Logansport, Indiana.

The complaint is in three paragraphs, to which a general denial was filed. The parties also agreed that all evidence admissible under any affirmative answers that could be filed to the complaint might be heard under the general denial, and that any proper evidence of the plaintiff in reply should be received without further pleadings.

The Fort Wayne and Wabash Valley Traction Company was made a party defendant, and filed an answer admitting that it had assigned and transferred to appellee the claim described in the third paragraph of complaint, and that it had no further interest in such claim.

The court found for appellee in the sum of \$1,254.48, overruled appellant's motion for a new trial, and rendered judgment for appellee in the sum aforesaid.

The only error assigned and relied on for reversal is the overruling of the motion for a new trial.

“The three paragraphs of complaint are substantially alike. In substance, it is alleged that Fort Wayne and Wabash Valley Traction Company originally constructed the crossings, described separately in each paragraph of the complaint, of its track and the track of appellant, on public streets in the city of Logansport, at its own expense; and that the crossings, so constructed by it, became worn and unfit for use, and that the appellant thereupon notified the appellee, who became the owner by purchase, on February 28th, 1911, of the street railroad owned by Fort Wayne and Wabash Valley Traction Company, to replace and renew the crossings, and of the notice from the appellant, the appellee replaced and renewed the crossings, described in the first and second paragraphs of the complaint and, under like conditions and circumstances, Fort Wayne and Wabash Valley Traction Company renewed the crossing described in the third paragraph, at its own expense, and thereafter sold and transferred its claim therefor against appellant to the appellee; that after the several crossings were replaced and renewed, demand was made upon the appellant to pay one-half of the cost thereof; that appellant declined to pay the one-half of such cost, and that under the facts alleged, and under the law, the appellant became liable to the appellee for one-half the expense of renewing the crossings.”

A new trial was asked on the ground that (1) the decision of the court is not sustained by sufficient evidence, and (2) is contrary to law.

There is no dispute in the evidence as to any material fact in the case. It shows that appellant is a steam railroad corporation organized under the laws

Vandalia R. Co. v. Fort Wayne, etc., Traction Co.—68 Ind. App. 120.

of the States of Illinois and Indiana, and that prior to January 1, 1905, it acquired and owned the lines of railroads which pass through the city of Logansport, Indiana, and cross Michigan avenue and Sixth street in said city; that such avenue and street were duly dedicated and used as public streets before said railroad tracks were laid across them; that prior to the time when appellant acquired and became the owner of said railroads, a corporation known as the Logansport, Rochester and Northern Traction Company was duly organized under the laws of Indiana, and authorized to own and operate interurban and street railroads; that on July 22, 1902, the common council of said city duly enacted an ordinance under which said interurban company, its successors and assigns, were granted the right to lay street car tracks and operate street cars over and upon the said street and avenue. Thereafter said interurban company began laying its tracks on said streets, and to complete its lines it was necessary to cross the tracks of the Terre Haute and Logansport Railway Company at two places on Michigan avenue and the tracks of the Logansport and Toledo Railway Company at one place, and it was also necessary to cross the tracks of each of said railroad companies once on Sixth street. On July 22, 1902, the Logansport, Rochester and Northern Traction Company, and each of said railway companies aforesaid, entered into written contracts, whereby said railway companies granted to said traction company the right to construct and forever maintain and operate a single track interurban railway across the tracks of said railway companies at each of the aforesaid crossings. Subsequently thereto said traction company laid its

Vandalia R. Co. v. Fort Wayne, etc., Traction Co.—68 Ind. App. 120.

tracks across the railway tracks aforesaid, and installed suitable crossings in conformity to the provisions of said contracts. In 1904 said Logansport, Rochester and Northern Traction Company sold, and by written instrument transferred, its said property to Fort Wayne and Wabash Valley Traction Company, and on February 27, 1911, the latter company in like manner transferred said interurban property to appellee. By consolidation of certain railroads appellant became the owner of the railway lines aforesaid, and on or about November 1, 1912, notified Fort Wayne and Wabash Valley Traction Company and appellee to renew and put in the crossings aforesaid, and stated in its written notices that it would remove said crossings and put in straight rails unless the same were renewed by appellee; that thereupon appellee notified appellant that it would renew each of said crossings, and when the work was completed would bill against appellant for its part of the cost thereof. Thereafter the work was completed, and demand made on appellant for payment of one-half of the cost of renewing the several crossings aforesaid, and payment was refused.

Except as to names, the contracts in relation to the crossings aforesaid are substantially alike. Said agreement as far as material here is as follows:

“Article I.

“In consideration of and upon the condition and covenants hereinafter stated, to be by the second party kept and performed, the first party hereby grants to the second party the right to construct and forever maintain and operate its single track street and interurban railway upon

Vandalla R. Co. v. Fort Wayne, etc., Traction Co.—68 Ind. App. 120.

and across the right of way and tracks of the first party, at the following points in the City of Logansport, State of Indiana, to-wit: Once on Sixth Street and twice on Michigan Avenue, as shown on the blue print hereto attached and made part hereof, marked Exhibit "A," and being the points where said railway of the second party now crosses the right of way and tracks of the first party.

"Article II.

"In consideration of the premises, the second party hereby agrees that it will construct and maintain its wires beneath the wires of the first party, so as to clear the lowest wire of the first party by at least five (5) feet, and that the second party's wires shall always be at least twenty-two (22) feet above the top of the rail of the first party's track; and, in case the wires of the first party as now constructed will not permit the construction of the wires of the second party as herein provided, then the second party will bear all of the expense of changing the wires of the first party so that the wires of the second party may be constructed as herein provided. The second party further agrees that it will, at its own expense, construct and maintain guard wires in such manner as will be designated by the first party from all possible danger of contact with the wires of the second party.

"Article III.

"The second party further agrees that it will, at its own expense and under the direction of the Engineer of Maintenance of Way of the first

Vandalla R. Co. v. Fort Wayne, etc., Traction Co.—68 Ind. App. 120.

party, furnish and construct the necessary crossing fixtures, rails, ties and all other materials necessary to make such crossings safe and acceptable to said Engineer, and will likewise at all times hereafter at its own expense maintain said crossings in like manner; and will also at its own expense furnish and maintain such additional crossing fixtures, rails, ties and other materials and construct and perpetually maintain in like manner such additional crossings as may from time to time become necessary by reason of the intersection of the railway of said second party with any additional track or tracks that may hereafter be laid by the first party upon its right of way; and in order to provide suitable protection against danger to human life, the second party hereby further agrees and covenants that it will at its own expense construct and forever maintain in its track at the proper distance from the tracks of the first party and on both sides thereof, at each of the crossings aforesaid, and in proper manner, a derailment device, consisting of a switching connection, the normal position of which shall be such that a street car passing over it will be derailed and turned from its course towards the first party's tracks, and that such derailment can only be avoided by a movement of the switch on the opposite side of the first party's tracks from that on which the second party's car may be approaching. And if under the now existing law, the construction and maintenance of other safety devices at said crossings, or either of them, shall ever be required, then the second party hereby covenants

Vandalia R. Co. v. Fort Wayne, etc., Traction Co.—68 Ind. App. 120.

and agrees that it will construct and maintain the same at its own expense.'

At the trial the parties entered into a stipulation, a part of which is as follows:

"The only consideration given for the execution by the Logansport, Rochester & Northern Traction Company of either of said written contracts, one with the Terre Haute & Logansport Railway Company, and the other with the Logansport & Toledo Railway Company, heretofore set out in this statement, or for any of its promises and agreements therein contained was the grant by the first parties to said contracts to said Traction Company to lay and maintain its tracks on said Avenue and Streets across the tracks of said first parties as expressed in Articles I of each of said contracts, but the plaintiff denies that such grant constituted any consideration for the promises of said Traction Company in said contracts contained."

Appellant states in its briefs that there are only two questions in the case, viz.: (1) Were the two contracts aforesaid relating to the crossings valid between the original parties thereto? (2) If valid between the original parties, are they binding upon their successors in title, the appellant and appellee?

Appellant insists that each of said questions should be answered in the affirmative, and in support thereof invokes the provisions of the contracts as to details relating to the crossings and the provisions of §5654 Burns 1914, Acts 1903 p. 330, §3, under which it asserts that appellant was a creditor of appellee.

Appellee asserts that the contracts were executed

Vandalla R. Co. v. Fort Wayne, etc., Traction Co.—88 Ind. App. 120.

without any consideration, and were invalid and unenforceable as between the original parties; that in any event they were not binding upon either appellant or appellee; that the construction and repair, or renewal of such crossings is regulated by statute; that such contracts are against public policy and unenforceable.

Sections 2 and 3 of the acts of 1901, Acts 1901 p. 461, being §§5676, 5677 Burns 1914, provide as follows:

5676—"Where it becomes necessary for the track or trolley wires of one street railroad company to cross the track or trolley wires of another street railroad company, or the track of any railroad company, the company owning the road last constructed at such crossing shall, unless otherwise agreed to between such companies, be at the exclusive expense of constructing such crossing in a manner to be convenient and safe for both companies."

5677—"Whenever such railroad crossing is constructed in the manner provided for in the preceding section, it shall be the duty of each company, respectively, to maintain and keep in repair its own track, so as at all times to provide a ready, safe and convenient crossing for all locomotives, trains or cars passing on either road at such point."

The above statutes were in force when the contracts involved in this suit were executed and have remained in force continuously since their enactment.

The public has a vital interest in the proper maintenance of crossings of the kind involved in this controversy. The safety of persons transported

1. over the crossings by such common carriers, and likewise the safety of other persons who

Vandalla R. Co. v. Fort Wayne, etc., Traction Co.—68 Ind. App. 120.

use the streets and pass over the crossings, is involved. The subject falls within the police powers of the state and is an appropriate field for legislative enactment.

The statutes, *supra*, in effect declare the public policy of the state to be against leaving open to contract, speculation, or controversy, the question

2. of who shall make necessary repairs to such crossings, or when they shall be made, and by such legislative enactment declares the policy of the state to be that the duty of maintaining and keeping in repair its own track at such crossings shall rest upon each company respectively, "so as at all times to provide a ready, safe and convenient crossing for all locomotives, trains or cars passing on either road at such point." *Railroad Commission, etc. v. Grand Trunk, etc., R. Co.* (1912), 179 Ind. 255, 259, 100 N. E. 852; *Hirth-Krause Co. v. Cohen* (1911), 177 Ind. 1, 9, 97 N. E. 1, Ann. Cas. 1914C 708; *Indiana, etc., R. Co. v. Barnhart* (1888), 115 Ind. 399, 410, 16 N. E. 121; *Vandalia R. Co. v. Railroad Commission, etc.* (1914), 182 Ind. 382, 387, 101 N. E. 85; *Pittsburgh, etc., R. Co. v. City of Hartford City* (1908), 170 Ind. 674, 677, 82 N. E. 787, 85 N. E. 362, 20 L. R. A. (N. S.) 461; *Louisville, etc., R. Co. v. Mottley* (1911), 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 300, 34 L. R. A. (N. S.) 671; *Chicago, etc., R. Co. v. McGuire* (1911), 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328, 338.

Under the law as declared in this state a street or interurban railroad laid upon a public street, by permission of the proper municipal authorities,

3. does not constitute an additional burden or servitude upon such street, but is within the

Vandalia R. Co. v. Fort Wayne, etc., Traction Co.—88 Ind. App. 120.

uses legally contemplated by the grant of such easement.

The undisputed facts of this case show that appellee's predecessor or the original owner of said street or interurban railway had the legal right to

4. lay its tracks across the tracks of said steam railway companies from whom appellant derived title to its property, and said street railway company, or its lawful successors in ownership, had, and still have, the right to maintain said tracks, and to operate cars thereon, all without the consent of the steam railway companies aforesaid, and against the will or desire of appellant. *Pittsburgh, etc., R. Co. v. Muncie, etc., Traction Co.* (1909), 174 Ind. 167, 176, 91 N. E. 600, and cases cited; *Baltimore, etc., R. Co. v. Cincinnati, etc., R. Co.* (1912), 52 Ind. App. 639, 644, 99 N. E. 1018, and cases cited. -

By agreement of the parties it is stated that the only consideration supporting the contracts relating to the several crossings aforesaid was the grant by the steam roads to the traction company of the right to lay and maintain its tracks on said street and avenue across the tracks of the steam roads "as expressed in Article I of each of said contracts."

The traction company therefore acquired no legal right that it did not already possess before entering into such contract. The mere withdrawal of an

5. objection which the party objecting had no legal right to interpose, or consent given to the doing of something which the party granted such consent had the legal right to do independent of such consent, does not afford a sufficient consideration to support a contract. *Baltimore, etc., R. Co. v. Cincinnati, etc., R. Co., supra*, and cases cited on page 644;

Vandalia R. Co. v. Fort Wayne, etc., Traction Co.—68 Ind. App. 120.

Shortle v. Terre Haute, etc., R. Co. (1892), 131 Ind. 338, 340, 30 N. E. 1084.

Appellant contends that the provisions in the contracts under consideration relating to the details of construction take them out of the above rule,

4. and afford sufficient consideration to support the contracts. The contracts considered in, their entirety, the express agreement of the parties as to the consideration and the statutes, *supra*, preclude such conclusion, and show conclusively that the contracts relate primarily to the right of the street car company to lay its tracks across the tracks of the steam roads.

The details of plan and construction that may lawfully be the subject of contract between such companies whose tracks cross each other are not the controlling features of the contracts now under consideration. If it be conceded, which is not done, by appellee in this instance, that some details are mentioned in the contracts, it is nevertheless apparent that they are incidental only, and that the main features of the contract are as above stated.

Reference has been made to the case of *Evansville, etc., Traction Co. v. Evansville Belt R. Co.* (1909), 44 Ind. App. 155, 87 N. E. 21, as supporting appellant's view of the contracts in controversy here.

The case is not in necessary conflict with the views above expressed. The subject is only discussed in a general way, and is not decisive of the questions presented in this case. The statute, *supra*, relating to the duty of such companies to repair and maintain such crossings had not been enacted when the contract considered in that case was executed. That contract was entered into in 1892, and the statute was

enacted in 1901. §§2, 3, Acts 1901 pp. 461 *supra*.

Considering the facts of this case in the light of the statute and the decisions of this court and of our Supreme Court, we hold the contracts above mentioned to be invalid and unenforceable for two reasons, viz.: (1) They are against public policy and in violation of the provisions of an express statute relating to the subject-matter of the agreements. (2) They are not supported by any sufficient consideration.

We find no reversible error in the record. Judgment affirmed.

NOTE.—Reported in 118 N. E. 839. See under (1) 33 Cyc 240, 242; (2) 33 Cyc 240, 242.

BARLEY v. SANSBERRY.

[No. 9,509. Filed June 25, 1918.]

1. **APPEAL.—Briefs.—Waiver of Error.**—Where no reference, either express or implied, is made in appellant's points and authorities to a ground of the motion for new trial, which was overruled, such ground is waived. p. 142.
2. **PARTNERSHIP.—Breach of Contract.—Action.—Evidence.—Sufficiency.—Good Faith.**—In an action by one partner against another to recover damages for an alleged breach of a partnership contract providing for the purchase from a trustee in bankruptcy of an automobile factory and that certain payments be made to plaintiff if an option for the repurchase of the plant by its former owner was exercised, evidence held to show that dependent partner, in selling under the option on time instead of for cash, acted in good faith and that plaintiff was tendered all that was due him under the contract, so that the evidence was sufficient to sustain the trial court's finding for defendant. pp. 147, 149.
3. **PARTNERSHIP.—Breach of Trust.—Action.—Burden of Proof.**—In an action by a partner to recover damages for an alleged breach of a partnership contract, the burden is on the plaintiff to show both the partnership and its breach. p. 148.

4. **CONTRACTS.—Written.—Explaining.—Parol Evidence.**—In an action by one partner against another for breach of a partnership contract for the purchase of an automobile factory, which contained an option for the repurchase of the plant by its former owner, parol evidence as to the option was admissible to explain the situation of the parties when their written contract was executed, where such evidence in no way changed the provisions of the written agreement, but only purported to make clear certain references therein. p. 148.

From Henry Circuit Court; *Fred C. Gause*, Judge.

Action by Albert C. Barley against James W. Sansberry. From a judgment for defendant, the plaintiff appeals. *Affirmed*.

Barnard & Jeffrey and *Condo & Brown*, for appellant.

Kittinger & Diven, *Forkner & Forkner* and *Charles K. Bagot*, for appellee.

HOTTEL, J.—This is an appeal from a judgment in appellee's favor in an action brought by appellant in which he sought to recover damages for an alleged breach of a partnership contract. For convenience and brevity appellant will be referred to herein as "B," and appellee will be referred to as "S." The provisions of said contract of partnership pertinent to the questions presented by the appeal, abbreviating the names of the parties as indicated, and amounts by use of figures only, are as follows:

"This agreement * * * entered into * * * February 19, 1914, by and between S, of Anderson, Indiana, and B, of Streator, Illinois, witnesseth:

"That the said parties agree hereby to enter into and form a partnership for the purpose of purchasing certain property, to wit: All that

part of the personal property to be sold by Frederick VanNuys, trustee in involuntary bankruptcy proceedings of Henry Nyberg and the Nyberg Automobile Works, that is not covered by a lien as declared in favor of S and The National Exchange Bank of Anderson, Indiana, and the tax lien as held by H. V. Otto, trustee.

“It is not intended hereby to enter into any contract as to the purchase of said property covered by said liens, other than *this contract depends upon S, who holds the larger portion of said lien, securing the title to all said property by virtue of his * * * lien * * **.

“It is agreed that said partnership will buy said personal property not covered by said lien * * *, for the price * * * of \$7,500.00, of which sum B will pay \$1,000.00 in cash and S \$6,500.00; the title to said property to vest absolutely in * * * S.

“And said parties *have given an option* and do hereby give an option to one Henry Nyberg that the said Nyberg may, within ten (10) days from this date, purchase all of said personal property so purchased by this partnership for Seventy-five Hundred Dollars as aforesaid, for the price and sum of \$8,500.00 cash; and *if said option is not exercised by said Nyberg within said time*, then it is understood and agreed that the *said property may remain where it now is* in the plant and buildings on the real estate which S will secure (*if he shall secure the same by virtue of his said lien*), for the space of four (4) months, the said partnership to pay as rental for said buildings during said time, to said S, the sum of

\$100.00 per month, and *S* is authorized to accept said payment from and close deal with * * * Nyberg, and turn over property to him, in which case * * * *S* is to pay *B* his \$1,000.00 paid and \$500.00, being $\frac{1}{2}$ of said profit, in full of his interest in this contract.

“*B* agrees to take charge and absolute control of all of said property, and to sell the same as rapidly as he can at private sale, for cash; and the cash so received shall be the property of * * * *S*, and turned over to him as rapidly as * * * received. But * * * *B* is only to sell repair parts during his option, and if Nyberg completes his option, then he will be entitled to the receipts from repairs less expenses.

“Said *B* shall have the privilege of taking from said property any of same, not exceeding in value \$2,000.00, at 50% of its appraised value, paying for the same when he so takes it in spot cash. *B* is to sell of the remainder of said property, except that which he so takes himself, at not less than eighty per cent. of its appraised value, unless by special agreement to the contrary.

“*B* also insures that he will sell within four (4) months at least \$6,500.00 of said property in addition to the amount necessary to pay expenses, and otherwise, he will advance the money to pay *S* the sum of \$6,500.00 which would be in payment of the said sum of \$6,500.00 so advanced by *S*, as hereinbefore stipulated. Then from the additional sales made, the sum of \$1,000.00 is to be next paid to *B*, in payment of the amount which he has advanced plus any amount which *B*

has paid to S to complete the \$6,500.00 to be paid him within four months; and from the residue to be sold herein as specified, and otherwise, after paying the necessary running expenses (B giving his time thereto without remuneration) $\frac{3}{5}$ of the net profits shall go to B and $\frac{2}{5}$ thereof to S.

“It is further agreed that if all said property is not sold at private sale within four months * * *, then the residue shall be sold at public outcry for what it will bring, in cash, so as to end said partnership agreement.

“S further agrees that B may at any time within four months pay to said S said sum of \$6,500.00 advanced as aforesaid, and \$1,500.00 as and for his profits, in which event said personal property shall all belong to B.

“It is further agreed that during the existence of this partnership agreement, the manager thereof may sell the parts and repair parts from the Rider-Lewis Company stock, at list price, which will belong to S; and also may sell any other machinery or property belonging to S at prices satisfactory to S, and for making said sales the said partnership shall have 15% of the amount realized therefrom.

“It is further agreed that this partnership agreement shall last and be in full force for a period of four (4) months and enough longer to sell at public outcry the residue of said property and close the matter out.

*“Should S not be able to get his lien question settled and get title to said real estate and other property satisfactory to him, then this agreement shall not be in force. * * **

“In Witness Whereof,” etc. (Our italics.)

Barley v. Sansberry—68 Ind. App. 132.

The Henry Nyberg mentioned in said contract will hereinafter be referred to as "N."

Following this agreement, the complaint contains averments showing a purchase of said property by B and S, in accord with the terms of such agreement, a delivery to them of a bill of sale therefor, and that they "have been partners in the ownership of said personal property and the proceeds of the sale thereof except as hereinafter averred." The complaint then proceeds as follows: "That, by the terms of said written contract, it was agreed between the plaintiff and defendant S that they would give to defendant N, an option to purchase said personal property within ten (10) days from the date of said contract at and for the price of \$8,500.00 cash but it was not agreed in said contract that said personal property should be optioned and sold by the plaintiff and defendant S or either of them to any other person than N nor upon any other terms than \$8,500.00 in cash within said period of ten (10) days. *That, at the time said written contract was executed, it was fully known and understood between the plaintiff and defendant S that N was insolvent and a bankrupt and that it was impossible for him to exercise any option to purchase said personal property within ten (10) days from said date for \$8,500.00 in cash and that it was impossible for him to raise \$8,500.00 in cash within said period of ten days from any available resources of his own and that said provision as to said option to said N was placed in said contract and that said parties thereto both understood that same was placed in said contract for no other purpose than that they had tacitly promised N that, if he would pay them \$8,500.00 within said ten-days period that they would*

*give him personally the benefit of purchasing said personal property at the price aforesaid, but that, when said contract was executed, neither of the parties thereto had any idea of or any belief in the fact that it would be possible for N, from any resources of his own available to him, to exercise said option, purchase said personal property and pay said price of \$8,500.00 therefor within * * * 10 days.”* (Our italics.)

It is then averred that said property was at all times of the reasonable value of \$20,000; that B furnished S with a schedule of specific articles of said property, which he desired to purchase under the terms of said agreement at \$2,000, being 50 per cent. of the appraised value of said articles; that B was ready, able and willing to pay \$2,000 cash for said articles, and so notified S, and demanded that they be turned over to him, in accord with the terms of said agreement; that said articles were of the value of \$5,000, and that B could sell them for said sum at a net profit to himself of \$3,000; that he was ready, able and willing to pay S \$8,000 for his interest in all of said property, as provided in said contract, and so notified S; that S, from and after February 26, 1914, refused to recognize B as having any interest in said property; that about February 19, 1914, S took charge and control of said property, and since that time has been selling and disposing of the same; that, on February 26, S notified B that N had exercised his option to purchase said property, and S then mailed to B a check for \$1,500 as his part of said option purchase, and again, on February 27, personally told B that N was the owner of and in possession of said property, and that he, B, had no further in-

terest therein; that B refused to accept said check and tendered it back; that S never in fact sold said property to N; that N never paid S a penny on said property, and that S's notification, statements and representations that N had exercised his option of purchase were false and were made for the fraudulent purpose of cheating B out of his partnership interest in said property.

The written contract between N and S is then set out. This contract is lengthy, and we indicate only those provisions pertinent to the questions presented by the appeal. They are as follows:

“That Whereas, on the 31st day of January, 1914, by decree before the referee in bankruptcy, in the matter of N and Nyberg Automobile works, involuntary bankrupts, on the intervening petition of S, said S was decreed to have a first and prior lien for the amount of * * * \$11,703.26, and the National Exchange Bank of Anderson, Indiana, was decreed to have a lien second only to that of S in the amount of * * * \$9,043.45 on the following described real estate and personal property, to wit: * * *

“And Whereas, the same was by said referee ordered sold on the 16th day of February, 1914, and S has made arrangements, by virtue of said sale and otherwise, to become the sole and exclusive owner in fee simple of all said described property; and

“Whereas, S, in connection with one B, has made arrangements to become the owner, for the sum of \$7,500.00, of all the personal property sold by said Trustee not included in or covered by the lien of S and said Bank, which said prop-

erty was also sold by said Trustee in Bankruptcy on the 14th day of February, 1914; and

“Whereas, there is also a lien on said real estate in favor of one H. V. Otto, Trustee, by reason of a tax certificate, amounting when the same was sold, to \$1,204.64 and penalties thereon; and

“Whereas, S and B in their agreement for the purchase and taking over the title to said personal property, as aforesaid, have given N the option to take the same over within 10 days for * * * \$8,500.00;

“Now, on account of all said considerations, *and the further consideration of N and his wife executing their quitclaim deed conveying to S all their right, title and interest in and to said above described property, by which S becomes the owner absolutely in fee simple without any liens whatsoever or rights in anybody else in and to said property, said S agrees hereby to take over the said option of N as to purchase of said personal property and to pay B all the cash he had paid in, for and upon the purchase of said property and one-half of said profit, to wit, \$500.00, and thereby S becomes the absolute owner of all of said property for the amount due on said decretal order in favor of himself, of * * * \$11,703.26 with interest from the 31st day of January, 1914, said sum of * * * \$9,043.45 due the National Exchange Bank of Anderson, Indiana, with interest from the 31st day of January, 1914; and the amount it may take to pay said Otto, Trustee, for said tax certificate and in redemption thereof, and any other taxes or*

penalties there may be upon said property; and to pay \$8,000.00 by reason of paying \$7,500.00 to the Trustee in Bankruptcy, as aforesaid, and \$500.00 to B for said personal property; all of which consists of the amount that S will have invested in said property, and having that amount invested therein he becomes the sole and absolute owner of all of said property, without any liens or rights of any other person whatsoever therein or thereto.” (Our italics.)

Here follows in detail the arrangement between N and S, which, in effect, gives N charge and control of all of said property as agent for S, with power to sell the same, subject to certain named conditions and restrictions, and with a provision binding S to convey to N all of the remaining property when S has been fully paid the several amounts which he has invested in said property, as set out in said contract. It is then alleged that S, about the time the contract between him and appellant was executed, was able to and did get said lien question, and the title to said real estate, referred to therein, settled by contracts, deeds, etc. There is a prayer for damages and an accounting of the partnership affairs, etc.

The answer is in five paragraphs, consisting of a general denial and four affirmative paragraphs, which present, in varying form, the principal issues, viz., payment, that the sale to Nyberg was made in accordance with the terms of the partnership agreement, and that appellee thereafter tendered to appellant the full amount due him as a result of such sale, which tender was refused. The issues thus formed were submitted to the court for trial, with the result before indicated.

A motion for new trial, filed by B, was overruled, and this ruling alone is assigned as error and relied on for reversal. This motion contains but

1. three grounds, and no reference, either express or implied, is made in B's points and authorities to the third ground. Such third ground is therefore waived. The two remaining grounds respectively challenge the decision of the trial court as not being sustained by sufficient evidence and as being contrary to law.

B's contention, briefly stated, is in effect as follows, viz.: That the agreement entered into between him and S evidences a definite contract of partnership under which the personal property described therein was subsequently purchased and held for disposition in accord with its terms; that, where the partnership relation exists, the law imposes upon each partner the duty of acting with the utmost good faith toward his copartner, and where one of the partners violates this duty by appropriating the firm property, he will be treated as a trustee of the firm and compelled to account to the other partner, citing: *Love v. Carpenter* (1868), 30 Ind. 284; *Horn v. Lupton* (1914), 182 Ind. 355, 105 N. E. 237, 106 N. E. 708; *Leader Pub. Co. v. Grant Trust, etc., Co.* (1914), 182 Ind. 651, 108 N. E. 121; 30 Cyc 458; 2, 3 Pomeroy, Eq. Jurisp. (4th ed.) §§956, 958, 963, 1062, 1077; 2 Lindley, Partnership (4th ed.) 569; *Mumford v. Murray* (1822), 6 Johns. Ch. (N. Y.) *452. It is claimed by B that the arrangement between S and N, as evidenced by their written agreement, was a violation by S of his partnership agreement with B, and an attempt by S to deprive B of his rights in said partnership property by indirectly converting such property to

his (S's) own use. S, on the other hand, does not question the correctness of the legal principle involved in B's contention, but insists that it has no application to the facts of this case. Neither is it contended by S that the agreement between him and B was not one of partnership, but he does assert that such agreement was plainly conditional in character, and that it was to become fully effective only on the happening of two contingencies: (1) The termination of the rights of N in the property in question, and (2) the satisfactory adjustment of the title of S to certain other property which was subject to superior claims.

The evidence affecting and controlling the question presented by these contentions consisted of the written agreement between appellant and appellee, the written agreement between appellee and Nyberg, and also certain parol evidence. We have indicated above the parts of said respective written agreements which we think should have influence in the determination of said question. The parol evidence pertinent to said question is to the following effect, viz.: That when the assets of the Nyberg Automobile Works were offered for sale by the trustee in bankruptcy, N endeavored to buy in the property in order to save the plant for future operation; that he was opposed by other bidders, and that, although without personal means with which to finance the transaction, he had been promised the assistance of one Bowen in securing the necessary funds; that N did not receive the expected support from Bowen, whereupon B and S orally agreed with N that they would purchase the property and extend to him an option for its repurchase; that, pursuant to this agreement, they bid

in the property covered by their partnership contract and held the same subject to N's rights.

To be specific, there was parol evidence affecting said question in substance as follows: B testified that S told him that he had to get N's deed to get good title, and that they would have to make the contract conditional upon his being able to get it fixed up.

N testified in effect as follows: I had an arrangement with a Mr. Bowen of Auburn, N. Y., to come to the sale in my interest. On the day of the sale I got a telegram from Bowen in which he mentioned B. I then had a talk with B and told him that Bowen had promised me assistance and that I had a telegram from him in which he said he (B) would look after it for me. I told him I wanted to get the plant back. B then told me that that was his purpose in coming—to frame up a deal whereby I could get it back. S, B and I had a talk to the effect that their bidding would be for me, and I was to have Bowen's backing. I bid \$7,000 and thought I had bid it in at this amount. When they were going to open up the bids, B told me that he and S were going to bid it in at \$7,500, and that I could get it by paying them \$1,000 profit. S told me he would waive his \$500; that he did not want any profit out of it. B told me both before and after the sale that he would take care of me, and that the deal would be fixed so that I could get the plant and property. A few days later S and I executed the contract and I then took possession of the property and remained in possession. My wife and I at that time made a quit claim deed to S. I made payments under my contract. S had said he could furnish the money if we would make the deed, which was done. I bought the property about seven

or eight days after the public sale. S did not tell me anything about paying \$8,500 cash. He said a deal had been made between him and B whereby I was to get the plant, provided I allowed each a profit of \$500, and that he would waive his profit.

S testified to the following effect: I saw B the morning of the sale. He told me Bowen would be there and bid in the property for N. In the afternoon Judge Diven, N and I had a talk, wherein we agreed to buy the plant in for N and save the plant for the town. The next morning B told me that he had given N an option that we would bid the plant in at \$7,500 and make the option to him \$8,500, giving us a profit of \$500 each, if he closed, which would make a pretty good day's work. B said he would do this to square himself with Bowen. I explained to B that the title was mixed up and that I thought Mrs. Nyberg would have her interest, but that if I could arrange with N to get a quitclaim deed, I would carry out the option and contract he (B) had made with N. There was nothing said about the money at that time, except that we would turn it over to N for \$8,500, and that I thought N could buy it himself, or that he had friends who would help him. We went to see Mr. VanNuys, the trustee in bankruptcy, and told him we would raise N's bid \$500, and then went to see Mr. Otto and Mr. Grossman, who were bidding on the property, and asked them not to raise it, but to keep out, as we were aiming to save the property for N. They would not agree to this at the time, but after N saw them they agreed to it and did keep out. The property was then bid in, but I did not close up the deal until I got a quitclaim deed from N.

Judge Diven testified to the following effect: On

the morning of the sale, after the bids had been received, B, S and I had a talk, in which B suggested that we get the sale held up a day or so, and I asked if it was to be understood that if the sale was held up, the property should be bought in for the benefit of N. They agreed to this and I then saw the trustees and attorneys and told them of the arrangement, and the sale was not closed that day. I told them the bid would be raised. I stated to B and S that I knew N had some arrangement with parties there and that he had a bid. I next saw B at my office on the 19th. S was with him. B had a contract written up between himself and S. I looked it over, corrected and rewrote it as they talked it over. I went into the whole transaction and explained it fully. I then said that S would have to make some arrangement with N to get the quitclaim deed, and, before he could do that, they would probably have to make some arrangement whereby N could close his option. They said that was all right, and that it was to be held for N. The contract was written out and signed and they each took a copy. I then sent for N and explained to him what interest his wife might have; that it would be costly to S to foreclose, and told him if he and his wife would execute a quitclaim deed to S, I thought I could get S to advance the money to make good his, N's, option. He said he would do it. I informed S of this talk, and he agreed to furnish the money, but said that he would have to be protected.

The admission of this parol evidence is not here challenged, nor was it challenged in the trial court by any ground of the motion for new trial; but it is now strenuously insisted by appellant, in effect, that both the contract of partnership and the contract upon

which its breach is predicated are in writing; that they are each certain and unambiguous in their terms and language, and that such being the case, the trial court should have looked to them alone for the determination of both the question of partnership and the question of the breach thereof, and that this court is likewise confined to said evidence; that said parol evidence was not admissible for the purpose of contradicting or disputing either of said writings; that, when said contracts alone are looked to, this court must construe them and say, as a matter of law, that the evidence shows both a partnership between B and S and a breach thereof by S, and hence that the decision of the trial court is not sustained by sufficient evidence and is contrary to law.

Assuming, without so holding, that B is right in his contention that the questions of the partnership and the breach thereof should be determined

2. from said contracts alone, we think enough appears from them to authorize the decision of the trial court. It will appear from the portions of the agreement between B and S, which we have italicized *supra*, that its existence was predicated on S's being able to secure all of said property by virtue of his lien; that the property purchased should remain in the building where situated *if S secured the same by virtue of his said lien*; that if S was unable to get such "lien question settled and get title to said real estate and other property *satisfactory to him, then this agreement shall not be in force.*"

By said agreement S "is authorized to accept payment from and close deal with N, and turn over property to him, in which case S is to pay his \$1,000 paid and \$500, being $\frac{1}{2}$ of said profit, in full of his interest in this contract."

It is undisputed, and in fact the complaint avers, that appellee mailed B a check for \$1,500, which was the admitted amount due for his interest in said property if N purchased it under his option. That part of the contract between S and N which we have set out *supra* recognizes the option theretofore given N by B and S as one of the conditions and a part of the consideration which induced said contract with N, and that portion of the latter contract which we have italicized expressly mentions, as a further inducement and consideration for its execution, the deed from N and wife by which S "becomes the owner absolutely, in fee simple, without any liens * * * or rights in anybody else in and to said property."

The burden was on appellant, not only to show the partnership alleged in his complaint, but likewise its breach, and if, as he contends, we were re-

3. quired to determine said question from said contracts alone, unaided by the parol evidence, we are of the opinion that the decision of the trial court could not be disturbed. However, if said parol evidence may be properly considered, no doubt can remain as to the sufficiency of the evidence to sustain the decision of the trial court. As before stated, the admission of said evidence is not challenged.

It should be noted, in this connection, that said evidence in no way changes the provisions of said written agreement between the parties, but pur-

4. ports only to make clear the references contained in that agreement to the option of N and the securing of other property by virtue of the liens referred to. Inquiry into the purpose of that provision relative to N's option, and the intention of the parties with reference thereto, was expressly invited

by the allegations of appellant's complaint, which we have quoted and italicized *supra*. B is now in no position to complain because S's understanding as to the purpose of the parties differs from his own, and, under the issues presented by the pleadings, parol evidence as to the collateral option which was extended to N was clearly admissible to explain the situation of the parties when their written contract was executed, and thus to assist the court in determining the full purpose of their agreement. *Driscoll v. Penrod* (1911), 176 Ind. 19, 23, 95 N. E. 313; *Reissner v. Oxley* (1881), 80 Ind. 580, 584; *Merica v. Burget* (1905), 36 Ind. App. 453, 459, 75 N. E. 1083; *International Harvester Co. v. Hauelsen* (1918), 66 Ind. App. 355, 118 N. E. 320, 323, 324.

The trial court has concluded that the primary intention of the parties was to provide a plan whereby N might regain control of his property, and

2. that the remaining provisions of their agreement were to become operative only in the event that N's efforts were unsuccessful. This conclusion is fully supported by the record.

B makes the further contention, however, that the option to N contemplated a purchase for cash, and that when S sold the property to N under an agreement which permitted the latter to pay for the same on a time basis, he violated the provision of the partnership contract and exceeded his authority thereunder. It appears from the record, however, that when N exercised his option within the agreed period of ten days, the sum of \$1,500 then due B was at once tendered to him and refused. It is true that the amount due S as his share of the purchase price was not formally loaned to N and then repaid to S, but the

Story, etc., *Piano Co. v. Davy*—68 Ind. App. 150.

omission of this useless ceremony is of no importance. *Robertson v. Van Cleave* (1892), 129 Ind. 217, 223, 26 N. E. 899, 29 N. E. 781, 15 L. R. A. 68. In substance, the transaction brought to B every dollar to which he was entitled under the option provision of the partnership contract, and it served to carry out the primary purpose of that agreement. The question of good faith on the part of S was squarely put in issue by the complaint, and the decision of the trial court in his favor is fully sustained by the evidence.

No error appearing in the record, the judgment of the circuit court is affirmed.

NOTE.—Reported in 119 N. E. 1013. Contracts: general rule that parol evidence not admissible to vary, add to, or alter a written instrument, 17 L. R. A. 270.

STORY AND CLARK PIANO COMPANY *v.* DAVY.

[No. 9,534. Filed April 5, 1918. Rehearing denied June 25, 1918.]

1. JUSTICE OF THE PEACE.—*Actions Before.*—*Failure to File Answer.*—*Defenses.*—*Statute.*—In an action originating before a justice of the peace, where no formal answer was filed, the defenses were limited to those authorized by §1749 Burns 1914, §1460 R. S. 1881. p. 151.
2. INFANTS.—*Contracts.*—*Adult Joint Obligor.*—*Avoidance.*—*Recovery of Payments.*—An infant is not precluded from recovering payments made upon a piano, after an avoidance of the conditional sale contract under which it was purchased, because an adult was her joint obligor, where all payments were made by or for her. p. 154.
3. PARENT AND CHILD.—*Emancipation.*—*Evidence.*—Where a father allowed an infant daughter to use and apply her earnings to the purchase of a piano, and, after she had avoided the purchase contract, prosecuted an action as next friend to recover payments made, such facts are evidence of her emancipation, which need not be proved by direct evidence, but may be implied from circumstances. p. 157.

Story, etc., Piano Co. v. Davy—68 Ind. App. 150.

4. PARENT AND CHILD.—*Child's Earnings.—Right of Parent.—Money Paid to a Third Person.*—Although a parent is generally entitled to the services and earnings of his minor child and may recover the value thereof from the person for whom the services were rendered, he cannot recover for himself the earnings which he has permitted the child to collect and pay to a third person. p. 157.
5. INFANTS.—*Contracts.—Conditional Sale.—Avoidance.—Recovery of Payments.—Return of Property.*—Where an infant bought a piano under a conditional sale contract, and, after the purchase price was paid in part, the piano was retaken by the seller, the contract did not become executed so that the seller could retain the payments, although the contract provided that, if the seller retook the piano in event of the purchaser's default, all money paid on the purchase price should belong to the seller as compensation for the use, rental and depreciation of the instrument. pp. 157, 161.
6. INFANTS.—*Contracts.—Avoidance.—Statu Quo.*—Although an infant, on the disaffirmance of a contract, must return the property acquired thereunder, yet it is not necessary, to make the disaffirmance effective, that he put the other contracting party in *statu quo*. p. 160.

From Marion Superior Court (97,299); *Joseph R. Williams*, Special Judge.

Action by Leona M. Davy, by her next friend, Martin F. Callahan, against the Story and Clark Piano Company. From a judgment for plaintiff, the defendant appeals. *Affirmed*.

Ulric Z. Wiley and *L. H. Van Briggles*, for appellant.

Holmes & McAllister, for appellee.

HOTTEL, J.—This is an appeal from a judgment in appellee's favor in an action brought by her to recover money paid by her to appellant upon a contract with it for the purchase of a piano.

The action originated before a justice of

1. the peace, and no formal answer was filed. The defenses, therefore, are limited to those authorized by §1749 Burns 1914, §1460 R. S. 1881.

The averments of the complaint pertinent to the questions presented by the appeal are to the following effect: Appellee at the time of the bringing of her action was a minor, under the age of twenty-one years. On May 28, 1911, appellant sold her a piano for the sum of \$297 and allowed her a credit thereon for \$110, by reason of the fact that previously to such sale appellee had solved a certain puzzle which entitled her to such credit. Appellee paid on such piano \$141. In October, 1914, said piano was returned to appellant and a demand made by appellee upon it to return to her said sum of \$141. This demand was refused. Appellee avoids and disaffirms her contract on account of infancy, and claims the return to her of said sum of \$141. Judgment is asked for said amount.

After a finding for appellee, appellant filed a motion for a new trial which was overruled. This ruling is assigned as error, and it alone is relied on for reversal. By it the decision of the court is challenged as not being sustained by sufficient evidence, and as being contrary to law.

The contract entered into at the time of the alleged purchase and sale of said piano is in evidence, and contains provisions, pertinent to the question which appellant seeks to have determined, as follows, viz.: A promise by appellee to pay appellant at its office, etc., \$297.50, as follows:

“Cr. allowance \$110.00 and agree to pay three dollars a week starting June 3rd for three weeks and thereafter One dollar & fifty cts. per week until fully paid. With interest on each of said sums at the rate of 6 per cent. per annum from

Story, etc., Piano Co. v. Davy—68 Ind. App. 150.

date, and 6 per cent. after maturity, with exchange."

It is then stated in said contract, in substance, that the conditions for the payment of said sum is the agreement of appellant to sell to appellee said piano, *the use of which is temporarily let by appellant to appellee upon the following conditions:* (We give the substance of those pertinent.) The piano to remain the property of appellant until each and every amount (mentioned above) and interest thereon and any judgment rendered thereon is paid in full, and in case of default of any of said payments or interest thereon at the time and place mentioned, without consent of appellant, or in case of sale or removal, etc., without such consent, appellee shall, on demand of appellant, deliver said piano to it in as good condition as when received, reasonable use and wear excepted, and in such case, appellant shall have the right without demand or notice to take said piano, and *in case it retakes possession of said piano all monies paid on the purchase price thereof shall belong to appellant as compensation for the use, rental and depreciation in value of said piano while remaining in appellee's possession*, or appellant may at its option enforce collection of each and every payment and interest thereon. In case of the payment by appellee of "each and every of said amounts and interest thereon, or payment of judgment obtained thereon," the full absolute and complete title in said piano shall vest in appellee.

This contract was signed by appellee and "Mrs. J. B. Kidd," who, the evidence shows, was appellee's grandmother.

Renewal contracts were also introduced in evi-

dence, one of which was signed by appellee and her grandmother, and the other by appellee and her mother. These contracts are not of importance in their effect upon the questions presented, and hence need not be set out.

The evidence shows, or at least tends to show, that, while some of the payments made on the piano were made by the mother, the grandmother, and the father of appellee, all the money paid thereon was the money of appellee, and that whatever payments were made by others were made for her with her money; that the total amount paid was \$141; that appellant by an action in replevin in October, 1914, obtained possession of said piano, and at the time of the suit had both the piano and the money paid thereon by appellee; that before the suit the appellee disaffirmed said contract and demanded the return of the money so paid by her, and appellant refused to pay it to her.

The questions thus presented by the appeal are stated by appellant in its brief in two "propositions"

as follows: "First. Where an infant who en-

2. ters into a contract with another who is an adult, to purchase a piano for her own use and benefit and agrees to pay for the same by installments, and makes numerous payments thereon, and then makes default, and the seller thereupon takes possession of the property sold under the terms of the contract, can such infant recover back the money so paid? Second. Where an infant with her grandmother or mother, who are both adults, enters into a contract to purchase a piano, to be paid for by installments, and where such infant earns money and turns it over to her grandmother or mother with

Story, etc., *Piano Co. v. Davy*—68 Ind. App. 150.

directions to them to make payments on the purchase price of the piano as they mature, and where she retains possession of the piano, and where she has the use and benefit of it during the period payments are made, and then makes default in such payments, and the seller takes possession of the piano under the terms of the contract, can such infant under such facts and conditions recover back from the seller the amount so paid?"

We think the first proposition is involved in the second, and that it, the first, presents the main and controlling question in the case. However, appellant insists that the fact that the contract was signed by the grandmother and renewed by the mother, each of whom is an adult, and that they each made some of the payments on the piano, should have a controlling influence in determining whether appellee can recover in this action. In support of this contention appellant cites *Kirby v. Cannon* (1857), 9 Ind. 371, and *Cutts v. Gordon* (1836), 13 Me. 474, 29 Am. Dec. 520. These cases refute, rather than support, appellant's contention. In support of this statement, we quote from each of said cases. In the first case a minor and an adult joined in the execution of certain notes upon which suit was brought against both of them. Upon the subject of the liability of the minor the court said, at pages 374, 375: "It may be observed, however, that in a suit against two upon contract, if one plead infancy, and be an infant, the plaintiff may *nol. pros.* as to him, and proceed to judgment as to the other. *Britton v. Wheeler*, 8 Blackf. 31. The reason is that the infant is not liable as a joint contractor. He need not have been sued in the first place. It would seem to follow, for the same reason,

that a release of the infant, he not being liable as a joint contractor, would not release the adult." The other case, *supra*, was also an action brought against a minor and an adult, and, in discussing the question of their respective liabilities, the court said, at page 480: "It is the province of the jury to pass upon the facts in controversy, and of the court, to enter such judgment, as is warranted by their verdict. In general in assumpsit, if they find one defendant did not promise, no judgment can be rendered against either. But if they find, that one defendant made no binding promise, by reason of infancy, this forms an exception to that rule, and the promise of the others remains, notwithstanding, binding upon them."

The effect of these holdings is that the adult obligor may not be relieved from his obligation merely because it is signed by a minor, but there is nothing in either of the cases even tending to support appellant's contention that the minor should be robbed of the protection which the law affords him simply because an adult is a joint obligor to the contract. We have before indicated that there was evidence tending to show that all the money paid on said piano was appellee's money. For the purposes of the question under consideration this fact must therefore be assumed as true, and the mere fact that another, who was an adult, whatever her relation to the contract might be, made the payment for appellee could have no effect upon appellee's right to take advantage of her minority in an action to recover such payments. Such fact might be of influence in determining the question to whom the money used in making such payments actually belonged, but it can have no influence in determining the legal question of appellee's right to recover the money actually paid by her.

Story, etc., *Piano Co. v. Davy*—68 Ind. App. 150.

Another question suggested by appellant, incidental to said main question, is that there was no evidence that appellee was emancipated, that the evi-

3. dence showed that whatever payments were made by her on said piano were made from her earnings, and that such earnings belonged to

4. her parent. It is true that generally speaking the parent is entitled to the services and earnings of his minor child, and he may recover from the person for whom such services are rendered the value thereof, but it does not follow that he may recover the earnings of such child which he has permitted to be collected by it and paid to a third person. *Jenison v. Graves* (1831), 2 Blackf. 440, 450. We might

add in this connection that the parent's re-

3. linquishment of his right to the services and earnings of his child need not be express, but may be implied from circumstances. In this case there was evidence tending to show that appellee was allowed by her father to use and apply her earnings on said contract, and it also appears that this action is prosecuted by the father as next friend. The trial court was therefore justified in inferring that the father had relinquished his right to such earnings, and that they belonged to appellee. *Biggs v. St. Louis, etc., R. Co.* (1909), 91 Ark. 122, 125, 120 S. W. 970; *Scott v. White* (1874), 71 Ill. 287, 290; *Aulger v. Badgley* (1888), 29 Ill. App. 336, 337. This brings us to the first or main question above indicated.

Appellant insists that under the facts of this case appellee's minority gives her no right to recover the money paid by her on said contract. As we un-

5. derstand appellant, this contention is based on the provisions of said contract for the sale of

the piano, which we have italicized *supra*. It is claimed in effect that, when appellee failed to make the payments provided for by said contract and appellant retook the possession of the piano under the terms of the contract, such contract became executed, in that such payments, under such circumstances, were payments for the use of said piano enjoyed by appellee during the period of her possession, and the depreciation in value of said piano caused by such use; that appellee could not and did not restore said piano in its original condition and with its original value; that she did not and could not place appellant in *statu quo*; that for said reasons appellee should not be permitted to recover the money which the contract expressly provides should be treated as payment for the use of such piano.

Appellant concedes that it has been unable to find any case decided by either of the courts of appeal of this state in which the exact question here presented has been decided, but cites the following cases in other jurisdictions as expressly deciding said question in accord with its contention: *Rice v. Butler* (1899), 160 N. Y. 578, 55 N. E. 275, 47 L. R. A. 303, 73 Am. St. 703; *Holmes v. Blogg* (1817), 8 Taunt. 35; *Valentini v. Canali* (1889), L. R. 24 Q. B. 166; *Johnson v. Northwestern, etc., Ins. Co.* (1894), 56 Minn. 365, 57 N. W. 934, 59 N. W. 992, 26 L. R. A. 187, 45 Am. St. 473.

Appellee, on the other hand, cites *McCarthy v. Henderson* (1885), 138 Mass. 310; *Pyne v. Wood* (1888), 145 Mass. 558, 14 N. E. 775; *Gillis v. Goodwine* (1901), 180 Mass. 140, 61 N. E. 813, 91 Am. St. 265; *Whitcomb v. Joslyn* (1878), 51 Vt. 79, 31 Am. Rep. 678; *Price v. Furman* (1855), 27 Vt. 268, 65 Am. Dec. 194, as hold-

ing exactly contrary to the cases cited by appellant, and insists that, although the question here involved has never been expressly decided in this state, our courts have frequently recognized and given expression to certain general principles which are out of harmony with the principle and cases upon which the New York case, *supra*, rests, and which in effect commit said courts to the doctrine adopted by the cases last cited as relied on by appellee. .

These general principles so relied on by appellee are as follows (We quote from her brief): "1. The contracts of an infant in respect to personal property are voidable, and may be avoided by the infant at any time during minority. *Carpenter v. Carpenter, Admr.* (1873), 45 Ind. 142; *Indianapolis Chair Mfg. Co. v. Wilcox* (1877), 59 Ind. 429; *Rice v. Boyer* (1886), 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53; *Shipley v. Smith* (1903), 162 Ind. 526, 70 N. E. 803; *Tucker v. Eastridge* (1912), 51 Ind. App. 632, 100 N. E. 113. 2. It is not necessary that the other party be placed in *statu quo*. The infant is not bound to return what he has received before suing for the value or possession of the property" given by him to the adult. *Shipley v. Smith, supra*; *Carpenter v. Carpenter, Admr., supra*; *Tucker v. Eastridge, supra*. "3. When the voidable contract of an infant is disaffirmed, it avoids the contract *ab initio*." *Shrock v. Crowl* (1882), 83 Ind. 243; *Rice v. Boyer, supra*; *Shipley v. Smith, supra*. 4. A contract made by an infant, although executed, is, as to him, voidable." *Clark v. VanCourt* (1884), 100 Ind. 113, 116, 50 Am. Rep. 774.

We agree with appellant that these decisions and the general principles therein announced are out of

harmony with the decisions cited and relied on

6. by appellant, and strongly support the conclusion reached in the Massachusetts and Vermont cases, *supra*. Appellant's contention, and the cases *supra* upon which it relies are based on the principle, recognized and affirmed therein, that before an infant can disaffirm his contract and recover whatever he has paid thereon he must first place the other contracting party in *statu quo*. The Indiana cases above cited expressly hold the contrary. As affecting this question, the Supreme Court in the case of *Shipley v. Smith*, *supra*, 528, said: "It is a general rule that the contracts of infants are voidable and may be disaffirmed, and it is not necessary, in order to give effect to such disaffirmance, that the other party be placed in *statu quo*. The infant is not bound to tender back the money or property he has received before suing for the value or possession of the property given by him to the adult."

We do not agree with appellant's contention that the contract in the instant case was executed, but, if it be conceded that it was, such fact would not necessarily deprive appellee of her right to disaffirm it during her minority, and to recover what she had paid thereunder. As affecting this question, the Supreme Court in the case of *Clark v. VanCourt*, *supra*, 116, said: "A contract made by an infant, although executed, is, as to him voidable * * * and it may be avoided by him at any time during his minority, or on his arrival at full age * * * without returning, or offering to return, to the other party, the property which was obtained from him under the contract."

It should probably be stated in this connection that

Story, etc., *Piano Co. v. Davy*—68 Ind. App. 150.

it should not be understood from these authorities or from anything said in this opinion that an infant can recover the money paid by him on personal property purchased while an infant, and also retain the property so purchased *as against the claim of the other party*. On the contrary, his act of avoiding his contract by which he acquired such property will divest him of all right to retain the same, and the other party upon restoring what he received may reclaim such property if it is in the infant's possession. The infant cannot avoid his contract "in part only, but must make the contract wholly void if at all"; and hence it will not protect him in the retention of any of the property obtained by him by virtue of the contract which he seeks to avoid because of his infancy. *Carpenter v. Carpenter, Admr., supra*. The question suggested, however, is eliminated in the instant case, because, as before stated, the appellant retook possession of its property and had it when appellee brought her action.

The decisions of this state, cited *supra*, make the following language of the court in the case of *McCarthy v. Henderson, supra*, 313, pertinent and

5. controlling in the instant case: "It is clear that, if the plaintiff had made no advance, the defendants could not maintain an action against him for the use of the property. The contract, express or implied, to pay for such use is one he is incapable of making, and his infancy would be a bar to such suit. We cannot see how the defendants can avail themselves of and enforce, by way of recoupment, a claim which they could not enforce by a direct suit."

The only Indiana case cited by appellant which lends any support to its contention is that of *Har-*

ney v. Owen (1837), 4 Blackf. 337, and this case in so far as it lends such support has been both expressly and impliedly overruled by later decisions. *Wheatly v. Miscal* (1854), 5 Ind. 142; *Dallas v. Hollingsworth* (1852), 3 Ind. 537; *Van Pelt v. Corwine* (1855), 6 Ind. 363; *Garner's Admr. v. Board* (1866), 27 Ind. 323.

Finding no error in the record, the judgment below is affirmed.

NOTE.—See under (1) 24 Cyc 560; (2) 22 Cyc 587, 616; (3) 29 Cyc 1675; (4) 29 Cyc 1627; (5) 22 Cyc 616; (6) 22 Cyc 613. Parent and child: necessity of returning consideration in order to disaffirm infant's contract, 28 L. R. A. 177.

CHASTAIN v. BOARD OF COMMISSIONERS OF THE COUNTY
OF ORANGE ET AL.

[No. 9,522. Filed June 26, 1918.]

1. APPEAL.—*Rulings of Trial Court.—Presumptions.*—On appeal every reasonable presumption is indulged in favor of the trial court. p. 164.
2. APPEAL.—*Briefs.—Rules of Court.—Burden of Showing Error.*—On appeal the duty rests on appellant to show by his briefs in substantial conformity with the rules of court that an error has been committed by the trial court to which he duly excepted at the time, and, failing so to do, he has no right to a reversal of the judgment from which the appeal is taken. p. 164.
3. APPEAL.—*Searching the Record.*—The court on appeal will not search the record to reverse, though it may do so to affirm. p. 164.

From Jackson Circuit Court; *Oren O. Swails*, Judge.

Proceedings before the board of commissioners of the county of Orange on the petition of Jacob R. Chastain to have accepted as completed a road constructed by him. Petition opposed by certain tax-

payers and, on a finding by the board against the petitioner, he appealed to the circuit court. From an adverse judgment, the petitioner appeals. *Affirmed.*

Elliott & Houston and *Kochenour & Prince*, for appellant.

Bayless Harvey, T. M. Honan and *Perry McCart*, for appellees.

FELT, P. J.—The appellant, Jacob R. Chastain, instituted proceedings before the board of commissioners of Orange county, Indiana, by filing a verified petition, in which he alleged that the work of constructing the Paoli and Campbellsburg road in Northeast township, of said county, had been fully completed by him in accordance with his contract, and prayed that said board accept said road as so completed.

Certain taxpayers appeared and filed verified answers to appellant's petition, in which they averred that said road had not been completed in accordance with the plan, profile, specifications and contract relating thereto, and in which they set forth in detail facts to show wherein said road had not been duly completed. They also filed an answer of former adjudication.

The board found against appellant, and he appealed to the Orange Circuit Court, from which the venue was changed to the Washington Circuit Court, and from there to the Jackson Circuit Court, where the case was tried by a jury. The jury returned a verdict in favor of defendants, appellant's motion for a new trial was overruled, judgment rendered on the verdict of the jury, and an appeal taken to this court.

The only error assigned is the overruling of the motion for a new trial.

Appellees insist that no errors are duly presented for the reason that appellant has failed to set out the motion for a new trial, or its substance, in his briefs, and has likewise failed to show that any exception was reserved to the action of the court in overruling the motion for a new trial.

The only reference to the ruling of the court in the briefs of appellant is made under "errors relied on for reversal," where it is stated that "the court erred in overruling the appellant's motion for a new trial," and a reference is given to the page of the record containing the assignment of errors. Neither the motion for a new trial nor its substance is set out in the briefs. The briefs nowhere state that appellant reserved an exception to the ruling on the motion for a new trial, and this court cannot know whether such an exception was or was not reserved, without searching the record independent of any assistance given by the briefs in the case.

Appellees have duly presented the proposition in their briefs, and appellant has sought no opportunity by amendment or otherwise to remedy the de-

1. fects. Every reasonable presumption is indulged in favor of the rulings of the trial court. On appeal the duty rests upon the appellant to
2. show by his briefs in substantial conformity with the rules of the court that an error has been committed by the trial court to which he
3. duly excepted at the time, and, failing so to do, he has no right to a reversal of the judgment appealed from. The court does not search the record to reverse, though it may do so in order to affirm.

Teepe v. Cloud—68 Ind. App. 165.

Cleveland, etc., R. Co. v. Beard (1913), 52 Ind. App. 105, 107, 100 N. E. 392; *Davis v. Bryant* (1913), 52 Ind. App. 343, 344, 100 N. E. 1062; *Harvey v. French* (1915), 183 Ind. 665, 110 N. E. 62; *Schlosser v. Schlosser* (1915), 183 Ind. 659, 110 N. E. 66; *Bray v. Tardy* (1914), 182 Ind. 98, 105 N. E. 772; *Keeley v. Bradford* (1916), 62 Ind. App. 683, 113 N. E. 748; *Spork v. International Harvester Co.* (1915), 58 Ind. App. 112, 107 N. E. 740; *Hill v. Chicago, etc., R. Co.* (1916), 61 Ind. App. 331, 332, 111 N. E. 951; *Harrold v. Whistler* (1916), 60 Ind. App. 504, 506, 111 N. E. 79; *Rook v. Straus Bros. Co.* (1916), 60 Ind. App. 381, 110 N. E. 1006.

Judgment affirmed.

NOTE.—Reported in 119 N. E. 1007.

TEEPE ET AL. v. CLOUD.

[No. 10,105. Filed June 26, 1918.]

1. **APPEAL.—Term-Time Appeal.—Failure to Perfect.—Dismissal.**—Where at the time the motion for a new trial was overruled, and during the term at which judgment was rendered, an appeal was prayed and the amount of bond fixed, but the appeal bond was not filed and the surety not approved until the succeeding term, and no steps were taken to perfect a vacation appeal, the appeal was not perfected and will be dismissed. p. 166.
2. **APPEAL.—Briefs.—Transcript.—Failure to Point Out.—Waiver.—Statute.**—Under the act of 1917, Acts 1917 p. 523, §3, §891c Burns' Supp. 1918, requiring appellee, within fifteen days after the time for filing appellant's briefs has expired, to file with the clerk of the appellate court his objections to the record and briefs together with a concise statement of his reasons therefor, and providing that failure to do so shall be a waiver of such objections, defects that the transcript contains no marginal notes, and that the briefs partly fail to make proper references to the transcript are waived, when not pointed out as required by the act, and the court may examine the transcript to determine the appeal on its merits. p. 166.

Teepe v. Cloud—68 Ind. App. 165.

3. **APPEAL.—Jurisdictional Defects.—Failure to Complete Appeal.**—The failure to perfect a term-time appeal by filing an appeal bond and having the bond approved at the term during which final judgment was rendered is jurisdictional, and is not waived by appellee's failure to object within fifteen days after the time for filing appellant's brief has expired as provided by the act of 1917, Acts 1917 p. 523, §3, §691c Burns' Supp. 1918, for making objections to record and briefs, since such defects, being jurisdictional, do not come within the terms of the act. p. 168.

From Marion Superior Court (101,928); *Theophilus J. Moll*, Judge.

Action by Louise R. Cloud against George Teepe and another. From a judgment for plaintiff, the defendants appeal. *Appeal dismissed.*

Burrell Wright, Jacob S. White and Harold Taylor, for appellants.

White & Jones, for appellee.

CALDWELL, C. J.—Appellee moves to dismiss this appeal, assigning the following reasons: First, that an attempt has been made to appeal under the statute providing for term-time appeals, but that the statute has not been complied with, and that no steps have been taken to perfect the appeal as a vacation appeal; second, that there has been a failure to comply with the rules of this court, in that the transcript contains no marginal notes, and appellants' briefs do not contain proper references to the transcript.

The facts on which the first reason is based are as follows: The judgment was rendered, May 17, 1917,

being at the May term of the trial court. The

1. motion for a new trial was overruled, May 21, 1917, being also at the May term of said court.

At the time of the ruling on the motion for a new trial appellants prayed an appeal to this court, which

was granted "upon defendants filing an appeal bond for \$500.00 within thirty days from this date, and filing bill of exceptions within sixty days thereafter." On June 20, 1917, being at the June term of the trial court, appellants filed an appeal bond in penalty as fixed by the court, with William M. Taylor as surety thereon, which bond was thereupon approved by the court and filed with the clerk. The transcript was filed in this court, August 18, 1917. It is not contended that any steps have been taken to perfect the appeal as a vacation appeal. Under such circumstances it would seem that the motion should be sustained and the appeal dismissed on authority of *Tuttle v. Fowler* (1915), 183 Ind. 99, 107 N. E. 674, and cases there cited, and, also, the later case of *Rohrbaugh v. Leas, Admr.* (1917), 63 Ind. App. 544, 114 N. E. 762.

Appellants, however, point to §3 of the act of 1917, Acts 1917 p. 523, §691c Burns' Supp. 1918, and insist that the situation here is governed by

2. that act, and that by virtue thereof appellee must be held to have waived each of the defects complained of, by reason of a failure to point them out within the fifteen-day period, and in the manner provided by §3 of that act. Appellants correctly interpret that section. Defects included within its provisions are waived if not pointed out as thereby required. When so waived, this court may examine the transcript to determine the appeal on its merits *Leslie v. Ebner* (1919), 67 Ind. App. 32, 117 N. E. 511, 118 N. E. 829. As to any of the defects now complained of appellee did not take the steps required by said §3, but for the first time and by means of a motion to dismiss points them out as grounds on which such

motion rests. It follows that, if the defects which constitute the grounds of the motion exist in fact, and if they are included within the scope of said §3, appellee has waived them, and we are authorized to overrule the motion. *Leslie v. Ebner, supra*. An inspection of the transcript discloses that it contains no marginal notes. An inspection of appellants' briefs likewise discloses that there has been a partial failure to make proper references to the transcript. These defects, forming the basis of the second reason assigned for dismissal as above set out, come within the provisions of §3, *supra*, and for reasons indicated have been waived by appellee.

The facts upon which the first reason is based amount to more than a defect. They are jurisdictional in nature. Being jurisdictional, the

3. effect of the involved omission is not comprehended by the curative provisions of said §3, *supra*. It follows that as to the facts involved in the first reason as above set out a waiver does not result from appellee's failure to proceed under such §3, *supra*, since as to such situation such section is not applicable.

Following the authorities above cited, the motion is sustained, and the cause dismissed for the reason first above set out.

NOTE.—Reported in 120 N. E. 29.

WEAVER ET AL. v. FERGUSON ET AL.

[No. 9,308. Filed November 21, 1917. Rehearing denied February 8, 1918. Transfer denied June 26, 1918.]

1. HIGHWAYS.—*Establishment.—Compensation.—Authority of Board of Commissioners.—Statutes.*—A final order of a board of county commissioners establishing a highway entered before the damages awarded were paid, deposited, or written consent given, as provided by §7659 Burns 1914, Acts 1913 p. 11, is void. p. 178.
2. HIGHWAYS.—*Establishment.—Void Order.—Right of Appeal.*—The fact that an order of the board of county commissioners establishing a highway was void did not affect the right to appeal therefrom, since an appeal may be taken from a void judgment. p. 178.
3. HIGHWAYS.—*Establishment.—Payment of Damages.—Statute.*—Section 7659 Burns 1914, providing that, on appeal from a proceedings to establish a highway, the proceedings shall be deemed vacated and of no effect if damages allowed are not paid within ninety days after the disposition of the appeal, applies, as amended by the act of 1913, Acts 1913 p. 11, to a petition for the opening of a highway filed on the same day that the amended act became effective. p. 178.
4. HIGHWAYS.—*Establishment.—Damages.—Void Judgment.—Collateral Attack.*—Where an appeal was taken to the circuit court from an order of the board of county commissioners establishing a highway and the county was not a party, an award of damages by the court to be paid by the county treasurer was void as to the county, since the court did not have jurisdiction over the person of the county and it could attack the award collaterally. p. 180.
5. HIGHWAYS.—*Establishment.—Damages.—Erroneous Award.—Collateral Attack.*—Where, on appeal to the circuit court from an order of the board of county commissioners establishing a highway, the court made an award of damages and ordered the same to be paid out of the county treasury, the power to make such an order being lodged solely in the board of county commissioners under §7655 Burns 1914, Acts 1905 p. 521, the award was erroneous rather than void as to those over whom the court had jurisdiction and they could not attack such judgment collaterally. p. 180.
6. HIGHWAYS.—*Establishment.—Appeal.—Damages.—Time for Payment.—Order Establishing Highway.—Collateral Attack.—Statute.*—Section 7659 Burns 1914, Acts 1913 p. 11, providing that on appeal from proceedings to establish a highway the proceeding

shall be deemed of no effect if the damages are not paid within ninety days, etc., places the same limitations on the circuit court on appeal as are imposed on the board of county commissioners before appeal, and a compliance with the terms of the statute is a condition precedent to the right or authority to enter a final order establishing a highway, and any such order prematurely entered is void and subject to collateral attack. p. 182.

7. *COUNTIES.—General Funds.—Appropriations.—Award of Damages.—Liability of County.—Statute.*—Under §5944 Burns 1914, Acts 1899 p. 343, providing that no court can bind the county except by judgment rendered in a cause where such court has jurisdiction of the parties and the subject-matter, except to the extent of money already appropriated and available for the purposes which the court is seeking to accomplish, and that any action of the court in violation of such statute shall be absolutely void, an order of the circuit court, on appeal from an order of the board of county commissioners establishing a highway, that the damage be paid out of the county treasury was void where the county was not a party to the proceeding and no appropriation of funds had been made. p. 184.
8. *HIGHWAYS.—Establishment.—Appeal.—Damages.—Agreement by Parties.—Validity of Award.*—Where the owner of lands affected by a proposed highway filed no remonstrance or other pleading that might have served as a basis for an allowance of damages in her favor, but she was, on her petition, made a party in the circuit court to an appeal from the board of county commissioners and, by agreement of the parties, she was awarded damages as part of the final order of the court, the absence of a pleading did not invalidate the mere allowance as between the parties. p. 185.
9. *HIGHWAYS.—Establishment.—Agreement as to Damages.—Effect.*—Even though the parties on appeal from an order of the board of county commissioners establishing a highway are bound by an agreement on appeal as to opening and damages, such agreement cannot validate a void order that the damages be paid out of the county treasury, where the county was neither a party to the proceeding nor to the agreement and there was no appropriation of funds to satisfy the claim for damages allowed. p. 185.
10. *HIGHWAYS.—Establishment.—Award of Damages.—Failure to Pay.—Effect.*—Where damages awarded in a highway proceeding had not been paid to a party or deposited to her use and she had not filed her written consent to the opening of the road prior to the entering of the final order establishing the highway, such order was void. 186.

11. HIGHWAYS.—*Establishment.—Agreement as to Opening and Damages.—Invalidity in Part.—Effect.*—Where, on appeal from an order of the board of county commissioners establishing a highway, the court by agreement of the parties made an order that the road be opened and the part of the order as to payment of damages was void, the agreement, being an entirety, was all void. p. 186.
12. HIGHWAYS.—*Enjoining Opening.—Estoppel by Silence.*—Where a landowner had agreed to an order of court opening a highway and fixing the amount of her damages, but she subsequently refused to accept the damages or file a claim based on the damages awarded, she was not estopped from enjoining the establishment of the road for certain illegalities in the proceedings on the ground that she allowed other landowners to remove their line fences and erect others along the line of the proposed highway, where she did nothing of an affirmative nature to mislead the affected landowner, or to show that she intended to abide by an invalid judgment based on the agreement. p. 188.

From Fountain Circuit Court; *Isaac E. Schoonover*, Judge.

Action by Sarah E. Ferguson and another against John R. Weaver and others. From a judgment for plaintiffs, the defendants appeal. *Affirmed.*

O. B. Ratcliff, for appellants.

C. B. Philpott, A. T. Livengood and Smith, Remster, Hornbrook & Smith, for appellees.

CALDWELL, J.—When this action was commenced and disposed of in the trial court, appellant Newlin was auditor of Fountain county, appellant Dicken was trustee of Troy township, said county, and appellant Weaver was road supervisor of district No. 1, said township. Appellees Sarah E. and David S. Ferguson brought this action to enjoin appellants as officials from opening an alleged public highway in said district, respecting the legality of the establishing of which there is controversy. A trial resulted in a special finding and conclusions of law.

Judgment was rendered on the conclusions in favor of appellees, enjoining appellants as prayed.

The questions presented on this appeal arise from appellants' exceptions reserved separately and severally to the conclusions of law. The following includes the substance of the finding necessary to determine the questions involved: On February 12, 1913, and thereafter, appellee Sarah E. Ferguson was the owner of the northeast quarter, and appellee David S. Ferguson was the owner of the east half of the southwest quarter and the west half of the southeast quarter, of section 23, township 20 north, range 9 west, Fountain county. On that day the requisite number of qualified freeholders, not including appellees, proceeding under §7649 Burns 1914 (Acts 1905 p. 521, as amended, Acts 1907 p. 443), filed their petition praying that a public highway thirty feet wide be located and opened up, its north line commencing at a designated point on the east and west half section line near the center of section 22, and extending east along said line to a designated point about eighty rods east of the center of section 23, said township and range. Subsequent proceedings were thereafter regularly had, under §7649 *et seq.*, *supra*, resulting in the filing of a reviewer's report on April 18, 1913, finding against David S. Ferguson on his remonstrance challenging the utility of the road, and in his favor on his remonstrance asking damages, awarding him \$300. Sarah E. Ferguson filed no remonstrance or other pleading before the board of commissioners. The contemplated road did not pass through her lands, but the north line of the former coincided with the south line of the latter for a distance. At the May term, 1913, the board of com-

missioners entered judgment and final order in said proceeding, granting the petition and establishing the road as prayed, ordering that the road be recorded, and that the auditor notify the proper township trustee as required by law, and that "the remonstrator David S. Ferguson shall receive as damages assessed by the reviewers herein the sum of \$300 which said sum shall be paid by the petitioners herein, and that the said road shall not be opened or improved until said amount is paid or tendered as provided by law, all other costs to be paid out of the county treasury as provided by law, all of which is finally adjudged and decreed."

At the time of the rendition of said judgment the \$300 damages thereby confirmed to David S. Ferguson had not been paid or tendered to him, or deposited to his use in the county treasury, and he had not filed his consent in writing to the opening of the highway.

David S. Ferguson appealed from said judgment to the circuit court of Fountain county. Sarah E. Ferguson was a party to the proceeding in the commissioners' court, but filed no pleading therein. She did not appeal to the circuit court. On her petition, however, she was ordered made a party in that court, and granted permission to file a remonstrance for damages, but she filed no remonstrance. Neither the board of commissioners nor the county was a party to the proceeding in the circuit court.

November 4, 1913, the court entered a final order in said proceeding. The order purports to change the line of all that part of the road east of a point eighty rods west of the northwest corner of David S. Ferguson's land as follows: The south line of the road

as changed angles northeast from said point to a point thirty feet north of said northwest corner; thence east to the terminus. Under the judgment David S. Ferguson's north line throughout becomes a part of the south line of the road, and Sarah E. Ferguson's south line from her west line east to the terminus of the road coincides with the south line of the latter. The more formal part of the order is as follows: "It is therefore ordered, adjudged and decreed by the court that the proposed highway along the route changed as shown and described above, will be of public utility, and that the remonstrator Sarah E. Ferguson will be and is damaged thereby in the sum of two hundred and eighty-eight (\$288.00) dollars, and that she have judgment therefor, and that upon the payment of said damages by the county treasurer of Fountain county, Indiana, and the said county treasurer is hereby ordered to make such payment within twelve months from this date upon the proper order, and said money shall be paid from the first moneys which can be had for such purpose. Said proposed highway should then be opened to the width of thirty feet, as above found, and kept in repair all as provided by law, but no opening shall be made until said damages are paid and in no event before June 1, 1914, shall said proposed road be opened. It is further ordered, adjudged and decreed by the court, that the clerk of this court shall issue a certified copy of this order and judgment to the county auditor of said county who shall record the same and shall certify this order to the township trustee, who shall then proceed to open all of said proposed highway according to law, when said judgment shall be paid as aforesaid and not until then.

It is further ordered, adjudged and decreed, that the parties hereto, pay of the costs of this proceeding, each has made herein." Said judgment was entered by agreement of all the parties to said highway proceeding pending in the circuit court, including Sarah E. Ferguson.

At the time of the rendition of said judgment or order, there were no funds in the county treasury with which to pay the damages awarded Sarah E. Ferguson, and no funds were available from any other source, and no appropriation had been made by the county council to that end, and said damages had not been paid or tendered. Sarah E. Ferguson had not filed with the county auditor her consent in writing that the highway might be opened.

April 6, 1914, the clerk of the circuit court certified the order to the county auditor. In April, 1914, the county auditor in vacation entered the judgment upon the records of the board of commissioners. June 1, 1914, the county council made an appropriation in the sum of \$288, for the purpose of paying the damages awarded to Sarah E. Ferguson. She, however, refused to file a claim before the board of commissioners based on the damages awarded, but on July 6, 1914, no claim having been filed, the board of commissioners allowed to Sarah E. Ferguson the amount of damages so awarded. July 7, 1914, a warrant was issued, based on such allowance, and delivered to her by registered mail December 5, 1914. She refused to accept it, and returned it December 30, 1914. Said damages have not been paid to or received by Sarah E. Ferguson or tendered to her except as above set out. The board of commissioners since the rendering of said judgment or order by the circuit court has

taken no steps relating to the highway proceeding except to make said allowance.

September 5, 1914, appellant Weaver, as road supervisor, notified petitioners and the Fergusons and other parties to said order (under the provisions of §7662 Burns 1914, *supra*) to remove their fences along the line of the proposed highway that it might be opened up, which notice was repeated January 23, 1915. Petitioners and parties to said judgment other than the Fergusons, thereupon in obedience to such notices did remove their fences, and built permanent and valuable fences along the boundary of such prospective highway where it crosses their respective lands. The road intersects the right of way of the Wabash Railroad Company. This company at the intersection opened its fences and built a crossing consisting of cattle guards and wing fences of a substantial nature, and at great expense and inconvenience, all of which was done with the knowledge of the Fergusons without objection from them, and in reliance that the Fergusons would abide by said judgment and without any notice from either of them that they would not do so.

Petitioners for said highway have been at all times and now are willing to perform said order and have done so except as prevented by appellees. Appellants are claiming the right to open the highway, and are doing so, and will continue unless restrained by the court, and in so doing they are acting solely under authority of said order rendered by the circuit court.

The court stated conclusions of law to the following effect: First, that the judgment of the board of commissioners was without authority of law, and therefore void. Second, that the circuit court was without

authority of law over the subject-matter in rendering the judgment of November 4, 1913. Third, that the circuit court did not have jurisdiction of the person in case of the county, and therefore was not authorized to render a judgment and order requiring it to pay damages. Four, that the judgment of the circuit court is void. Fifth, that appellants should be permanently enjoined as prayed.

Sections 7655 and 7659 Burns 1914, *supra*, have a bearing on such a highway proceeding as is involved here. The former is to the effect that where damages are assessed, the board, if it shall consider the proposed highway enterprise of sufficient importance to the public, shall order such damages and the costs to be paid out of the county treasury, otherwise such damages and costs shall be paid by the petitioners or other persons interested, and that "where payment of damages is made as herein provided, such highway shall be recorded and ordered to be opened, and kept in repair," etc. The latter section, in substance, provides in part that the highway shall not be opened, worked, or used, until the assessed damages shall have been paid to the persons entitled thereto or deposited in the county treasury to their use, or until such persons shall consent thereto in a writing filed with the auditor, and that if the damages are not so paid or deposited, such consent not having been filed, within ninety days from the filing of the report assessing such damages, the proceeding shall be deemed to be vacated.

Here apparently the board did not consider that the highway work was of sufficient importance to the public to justify an order that the damages assessed

in favor of David S. Ferguson be paid out of

1. the county treasury, and no order was made to that effect. The order was that the petitioners pay the damages. The effect of the order was such as to require petitioners to elect to pay the damages, or, in case no other interested person paid them, suffer a failure of the entire proceeding. Here, however, the damages had not been paid, or tendered or deposited, and written consent that the road might be opened had not been filed. Under such circumstances, the board, in contravention of the statutes, *supra*, entered a final order establishing the highway. Such order was therefore void as stated by the court in the first conclusion of law. See the following, where the subject is fully considered: *Helms v. Bell* (1900), 155 Ind. 502, 58 N. E. 707; *Lortz v. Davis* (1912), 50 Ind. App. 337, 343, 97 N. E. 200; *Kinzer v. Brown* (1907), 170 Ind. 81, 82, 83 N. E. 618.

The fact that the order was void did not destroy Ferguson's right of appeal. There may be an

2. appeal from a void judgment. *Louisville, etc., R. Co. v. Lockridge* (1884), 93 Ind. 191; 3 C. J. 467.

We proceed to a consideration of the judgment rendered by the circuit court in the highway proceeding. There is a further provision of §7659,

3. *supra*, that may have a bearing here, to the effect that in case of appeal the damages, if any, allowed on such appeal shall be paid or deposited or consent given as above indicated within ninety days after the disposition of such appeal, and if not so done in such time, such proceeding shall be deemed to be vacated and of no force or effect whatever. There is some suggestion whether such section in its entirety is applicable. Its earlier provisions have

been in force since 1853. R. S. 1852 p. 312; §5025 R. S. 1881. Additions were made by amendment in 1913. Acts 1913 p. 11. The amended section was passed with an emergency clause and went into force February 12, 1913, the day on which the petition was filed in the road proceeding involved here. The damages were assessed at a subsequent date, and by the amendment pending causes are not excepted. The section as amended is therefore applicable.

The following are some of the characteristics of the judgment rendered by the circuit court in the road proceeding: Thus, the court awarded damages to Sarah E. Ferguson in the sum of \$288, and decreed that she have judgment therefor. The court did not indicate the judgment debtor. The court, however, without assuming expressly to find that the road enterprise was of sufficient importance to the public to that end, as must be first done either expressly or impliedly by some authorized tribunal under the provisions of §7655, *supra*, did find and adjudge that such damages should be paid out of the county treasury, the first available funds to be drawn upon, and the county treasurer was ordered to make such payment within twelve months. The county was thus in form required to shoulder the burden of such damages, although neither through the board of commissioners nor otherwise was it a party. The court also leaving nothing for the determination of the board ordered the clerk to certify a copy of the judgment to the county auditor, the latter to record it and certify a copy to the township trustee, and the last named to open up the road, but not until the damages had been paid.

In determining the validity of the judgment en-

tered in the highway proceeding, we shall for the present eliminate the fact that it was entered by agreement. It will be observed that the county neither by its board of commissioners nor otherwise was before the court. It was not a party to the proceeding. That fact appeared affirmatively on the face of the record in the highway proceeding in the circuit court, and is expressly set out in the finding here. Moreover, it is held that a county by its board of commissioners is neither a necessary nor a proper party to such an appeal. *Jamieson v. Board, etc.* (1877), 56 Ind. 466; *Board, etc. v. Small* (1878), 61 Ind. 318; *Schmied v. Keeney* (1880), 72 Ind. 309.

Under such circumstances the court awarded damages and decreed that Sarah E. Ferguson have judgment therefor, the judgment, if it is such, being

4. in effect against the county, as the damages were ordered to be paid out of the county treasury. The court did not have jurisdiction over the person of the county, and that fact appeared affirmatively on the face of the record. As to the county, therefore, the award of damages was void and subject to collateral attack. *McKinney v. Frankfort, etc., R. Co.* (1895), 140 Ind. 95, 38 N. E. 170, 39 N. E. 500; *Davis v. Bayless* (1895), 140 Ind. 700; 15 R. C. L. 844.

For like reasons the order that the county treasurer pay the damages was a nullity. *McKinney v. Frankfort, etc., R. Co., supra.*

The court, by ordering the damages to be paid out of the county treasury, assumed to determine, at least impliedly, that the highway enterprise was of

5. sufficient importance to the public to justify such an order. The only statutory authority

for such an order is found in §7655, *supra*, to the effect that, if the board shall consider the proposed highway to be of sufficient public importance, it shall order the damages to be paid out of the county treasury. It is held under such statute that the question of paying out of the county treasury damages assessed in a highway proceeding is solely for the consideration and determination of the board, and that its action in that respect cannot be controlled, coerced or reviewed by any court. *Wilkinson v. Bixler* (1883), 88 Ind. 574; *Jamieson v. Board, etc., supra*; *Hayes v. Board, etc.* (1877), 59 Ind. 552; *Board, etc. v. Small, supra*; *State, ex rel. v. White* (1898), 151 Ind. 364, 51 N. E. 481. The holding is the same when the damages are assessed by the court or a jury on appeal. *Wilkinson v. Bixler, supra*; *Jamieson v. Board, etc., supra*. However, since the court entertained the question whether it had the power to determine whether such damages should be paid out of the county treasury, and apparently decided that it did have such power, the decision on that point and aside from all question of jurisdiction over the person, was erroneous rather than void, and from such viewpoint alone would not be subject to collateral attack. *Ryan v. Rhodes* (1906), 167 Ind. 121, 76 N. E. 249, 78 N. E. 330; *Stone v. Elliott* (1914), 182 Ind. 454, 106 N. E. 710; *Williams v. Wood* (1915), 60 Ind. App. 69, 107 N. E. 683.

The judgment rendered by the circuit court November 4, 1913, provided that the damages awarded should be paid out of the county treasury within twelve months. There was no available money in the treasury, and an appropriation purporting to render it available was not made until June 1, 1916.

Without any affirmative action on the part of Sarah E. Ferguson, the board, July 6, 1914, made an allowance in her favor of the amount of damages as assessed by the court. The next day a warrant was issued in her favor on the allowance. The warrant was sent to her December 4, and returned by her unaccepted December 30, 1914. Meanwhile, in April, 1914, the clerk certified the judgment to the auditor, who in vacation recorded it on the commissioner's record and certified a copy to the township trustee. In September the road supervisor notified the parties to remove their fences.

As appears above, a highway proceeding appealed to the circuit court is deemed to be vacated and of no force whatsoever, under the provisions of

6. §7659, *supra*, unless one of three events transpires within ninety days after the disposition of the appeal, viz.: In order to prevent such result, within such time, the damages allowed by the circuit court must be paid to the person entitled thereto, or deposited in the county treasury to his use, or he must file with the county auditor his written consent that the road may be opened. Here such written consent was not filed, the damages were not paid into the treasury, and no steps were taken to pay the damages for more than six months, and a warrant representing the amount of damages was not sent to Sarah E. Ferguson for more than a year after the disposition of the appeal. Section 7659, *supra*, seems to place the same limitations on the circuit court on appeal as are placed on the board in its consideration of the proceeding before appeal. It has already been developed that the courts hold that a compliance with said section is a condition precedent

to the right or authority of a board of commissioners to enter a final order establishing a highway, and that any such order prematurely entered is void and subject to collateral attack. *Helms v. Bell, supra; Lortz v. Davis, supra; Kinzer v. Brown, supra.*

It is held also in the *Helms* case that the payment of the damages into the county treasury at a time subsequent to the entering of the final order does not revive or validate the order. A final order entered by a board of commissioners under the circumstances indicated being thus held void, we are unable to discover any reason why a like conclusion does not follow respecting a final order entered by a circuit court under like circumstances.

However, in *Rudisill v. State, ex. rel.* (1872), 40 Ind. 485, the holding is to the effect that where a board of commissioners orders damages assessed in a highway proceeding, to be paid out of the county treasury, the presumption will be indulged that the money to satisfy the order is in the treasury, and that such order is therefore equivalent to a payment to the use of the person entitled to the same, and hence that such order alone without actual payment satisfies the statute.

But in *Lortz v. Davis, supra*, decided after the enactment of the county reform act, Acts 1899 p. 343 (§5918 *et seq.* Burns 1914), the holding is otherwise. There the board in a final order establishing a highway in effect directed that the damages assessed by the reviewers be paid out of the county treasury. There were no available funds in the treasury and an appropriation was not made by the county council until a subsequent date. Giving effect to the county reform act, the court ruled that *Helms v. Bell, supra*,

controlled, and that the final order establishing the highway was void and subject to collateral attack. The court said: "Such order did not authorize the auditor to issue his warrant or the treasurer of the county to pay such warrant in the absence of an appropriation for that purpose, and in case money had been paid out of the county treasury on any such warrant it could have been recovered from the person to whom it was paid."

To the suggestion that the several allowances made in that case as damages were judgments against the county rendered by a court having jurisdiction

7. of the subject-matter and of the parties, and therefore valid under §5944 Burns 1914, *supra*, although no appropriation had been made, the court say in substance that as the county was not a party to the proceeding, and there was no pre-existing claim against the county on which a judgment might rest, the allowances were not judgments. Section 5944, *supra*, cited in *Lortz v. Davis, supra*, is to the effect that no court of any county shall have power to bind the county except by judgment rendered in a cause where such court has jurisdiction of the parties and the subject-matter, except to the extent of money already appropriated and available for the purposes which the court is seeking to accomplish, and that any action of the court in violation of the section shall be absolutely void.

The *Lortz* case is authority that the allowance made to Sarah E. Ferguson here was not a judgment against the county, as that term is used in §5944, *supra*.

It is apparent that the prohibition declared by §5944, *supra*, circumscribes the power of circuit

courts as well as boards of commissioners, and that as a consequence, for reasons last indicated, the order of the court here that the damages be paid out of the county treasury, there being no appropriation, was absolutely void.

We are confronted then with this situation: The court's order that the damages be paid out of the county treasury was void for two reasons: First, the county was not a party to the proceeding; second, there was no appropriation. Under such circumstances, had the amount of damages been paid to Sarah E. Ferguson, as ordered, she in an appropriate action could have been compelled to return it. *Lortz v. Davis, supra*; §5962 Burns 1914, *supra*.

We next address ourselves to the agreement element of the court's order: Sarah E. Ferguson did not file any remonstrance or other pleading

8. that might have served as a basis for an allowance of damages in her favor. However, the entire final order of the circuit court including that part thereof awarding her damages was entered by agreement of the parties. The absence of a pleading therefore does not invalidate the mere allowance of damages as between the parties. *Indiana, etc., R. Co. v. Bird* (1888), 116 Ind. 217, 18 N. E. 837, 9 Am. St. 842; *Indianapolis, etc., R. Co. v. Sands* (1892), 133 Ind. 433, 32 N. E. 722; *Biddle v. Pierce* (1895), 13 Ind. App. 239, 44 N. E. 475. The fact of the agreement, however, cannot validate the order that the damages awarded be paid out of the county treasury, for two reasons: First, the order was in effect against

9. the county and it was a party neither to the proceeding nor to the agreement; second, there was no appropriation. Among the purposes in view

and accomplished in the enactment of the county reform act was the placing of some check and limitation on the power of boards of commissioners in the disposition of public funds. Had the county, by its board of commissioners or otherwise, been a party to the agreement, the order directing that the amount of damages awarded be paid out of the county treasury, would nevertheless have been void, there being no appropriation.

The damages allowed, then, were neither paid to Sarah E. Ferguson nor deposited to her use. Even though it should be conceded that as a mere theoretical proposition the order respecting the payment of the damages was binding on her, since she was a party to the agreement at its foundation, the consequent validity is barren of results, since, for reasons already stated, the damages could not legally be paid to her as ordered.

As the damages awarded to Sarah E. Ferguson had not been paid to Sarah E. Ferguson or deposited to her use prior to the entering of the final
10. order, such final order establishing the highway was void. *Helms v. Bell, supra; Lortz v. Davis, supra; Kinzer v. Brown, supra.*

But if it be said that, by reason of the agreement, the features of the final order, other than those pertaining to the payment of damages, were valid,
11. then we are led to inquire whether such assumed valid elements of the order are so distinct from the invalid that the former may be enforced. Calling to our aid the argument by analogy, the rule respecting statutes valid in part is as follows: "If the purpose of an act is to accomplish a single object only, and some of its provisions are void,

the whole must fail unless sufficient remains to effect the object without the aid of the invalid portion. And if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the Legislature intended them as a whole, and if all could not be carried into effect the Legislature would not pass the residue independently, then if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them.' " *Griffin v. State* (1889), 119 Ind. 520, 22 N. E. 7.

Back of the final order here, there was an agreement; a contract between the parties. In determining the question whether the fact of such agreement validated any part of such final order, the law that governs in determining the validity of contracts void in part is therefore, by analogy, closely applicable. "If a promise to do special acts is indivisible and is in part illegal, it cannot be enforced as to that part which is legal, but the whole agreement is void. * * * Where the agreement consists of one promise made upon several considerations, some of which are bad and some good, here, also the promise is wholly void, for it is impossible to say whether the legal or the illegal portion of the consideration most affected the mind of the promisor, and induced the promise." Clark, Contracts 472. "A contract illegal in part and legal as to the residue, is void as to all, when the two parts cannot be separated; when they can be, the good will stand and the rest fall. One entire consideration cannot, within this rule, be separated, though composed of distinct items, some of which are legal and others illegal." Bishop, Contracts §471.

“The general rule is, that if any part of an entire consideration for a promise, or any part of an entire promise, is illegal, whether at common law or by statute, the whole contract is void.” 1 Wait, Actions and Defenses 106; *James v. Jellison* (1884), 94 Ind. 292, 48 Am. Rep. 151.

The object of the agreement here, and which agreement by the court's action became a final order or judgment, was, from the standpoint of one party, the establishing of a public highway; from the standpoint of the other party, the allowance and payment of damages. The provision for the payment of the latter was the consideration to be received or the compensation to be paid in order that the former might be accomplished without objection. We have held that the order respecting the payment of the latter was invalid. It seems to us apparent that the former and the latter as elements of the agreement are so mutually related that the agreement was an entirety, and that the one element failing, the other cannot stand. See, also, *Consumers' Oil Co. v. Nunnemaker* (1895), 142 Ind. 560, 41 N. E. 1048, 51 Am. St. 193; *Chicago, etc., R. Co. v. Southern Ind. R. Co.* (1906), 38 Ind. App. 234, 70 N. E. 843; *Ricketts v. Harvey* (1886), 106 Ind. 564, 6 N. E. 325; 6 R. C. L. 816; 9 Cyc 566.

On the issue of estoppel the burden rested on appellants. The facts found by the court to which appellants point, as requiring a conclusion of law

12. that appellees are estopped, are in substance as follows: That at some unnamed time, but presumably after the road supervisor served notices for the removal of fences as above stated, appellants, relying on the Fergusons to abide by the judgment,

did remove their fences and erect others along the line of the prospective highway; that the Fergusons knew that appellants were so removing their fences and erecting others, but that they did not object or notify appellants that they would not comply with the judgment. With these facts certain others found by the court should also be considered, as that on or prior to July 6, 1914, and long before notices to remove fences had been served, Sarah E. Ferguson refused to file a claim based on damages awarded and subsequently refused to accept a warrant as indicated. It will be observed that after the rendering of the judgment Sarah E. Ferguson did no affirmative thing of a nature calculated to mislead appellants. Her affirmative acts indicated a disposition not to abide by the judgment. The facts do not establish the existence of an estoppel. See *State, ex rel. v. Palmer* (1915), 184 Ind. 7, 110 N. E. 213.

The finding supports at least the first, second, fourth and fifth conclusions of law, and these are sufficient to sustain the judgment. Judgment affirmed.

NOTE.—Reported in 117 N. E. 659. See under (2) 37 Cyc 131; (4) 37 Cyc 128; (9) 37 Cyc 125.

INDIANA STATE BOARD OF DENTAL EXAMINERS v.
FETROW.

[No. 9,978. Filed June 27, 1918.]

1. *APPEAL.—Time for Perfecting.—Motion to Set Aside Default.—Effect.*—A motion to set aside a default judgment does not have the effect of extending the time for taking an appeal. p. 191.
2. *APPEAL.—Decisions Appealable.—Motion to Set Aside Default*

Indiana State Board, etc. *v.* Fetrow—68 Ind. App. 189.

Judgment.—An appeal will not lie from the ruling on a motion to set aside a default. p. 191.

From Miami Circuit Court; *Charles A. Cole*, Judge.

Proceedings by Samuel W. Fetrow before the Indiana State Board of Dental Examiners. From a finding denying him a certificate entitling him to practice dentistry, Fetrow appealed to the circuit court. From a judgment in his favor, the board appeals. *Affirmed.*

E. B. Stotsenberg and Ele Stansbury, Attorneys-General, *H. C. Phelps, Fred B. Johnson, Albert H. Cole, Elmer E. Hastings, Dale F. Stansbury* and *L. O. Arnold*, for appellant.

Tillett & Lawrence, for appellee.

IBACH, J.—On December 11, 1914, appellee, being a resident of Miami county, filed his appeal in the circuit court of that county under §6106 Burns 1914, Acts 1913 p. 340, §3, asking that the appellant board be required to show cause why a certificate entitling him to practice dentistry in this state should not be issued.

The record disclosed that a purported notice of such appeal was issued to the sheriff of Monroe county, Indiana, directing him to serve the same upon Fred J. Prow, secretary and treasurer of the appellant board, which was done, as shown by the return of such sheriff on December 16, 1914. On January 16, 1915, appellant board was defaulted and a decree rendered directing the clerk of the court to issue to appellee a license to practice dentistry in this state upon the payment of the requisite fee. On February 8, 1915, at the same term of court, appellant, represented by the Attorney-General, filed its motion, together with his affidavit in support of the same,

praying that the default and judgment be set aside. This motion was overruled and an exception saved.

It is clearly apparent from the record that this is an attempted appeal from the ruling of the court in overruling the motion to set aside the default.

Appellee has filed a motion to dismiss the appeal upon the ground that the order appealed from is not a final judgment, and that there is no attempt to appeal from the judgment on default. Furthermore, that if it is an attempted appeal from the judgment on default, it is not brought within time. *Kurtz v. Phillips* (1916), 63 Ind. App. 79, 113 N. E. 1016.

It appears from the record that while the motion to set aside the judgment by default was filed at the term at which the judgment was rendered, such

1. motion was not ruled on until October 4, 1915, and more than 180 days after the judgment on default was rendered. A motion to set aside a default, unlike a motion for a new trial, does not have the effect of extending the time for the taking of an appeal. *Thomas v. Thomas* (1916), 61 Ind. App. 101, 110 N. E. 573, and cases cited; *Treloar v. Harris* (1917), 65 Ind. App. 22, 116 N. E. 590. It necessarily follows that an attempted appeal from the judgment on default would be without force, and, as under the case of *Kurtz v. Phillips, supra*, an appeal will
2. not lie from the ruling on the motion to set aside a default, the questions sought to be presented cannot be considered. Appeal dismissed. Dausman, J. dissenting.

GLASSER V. JONES.

[No. 9,628. Filed June 27, 1918.]

1. **APPEAL.—Questions Reviewable.—Insufficiency of Complaint.—Assignment of Errors.**—Error assigned on the “Insufficiency of the complaint to state a cause of action,” presents no question for review on appeal. p. 194.
2. **JUSTICE OF THE PEACE.—Pleading.—Complaint.—Sufficiency.—Determination.**—In an action originating before a justice of the peace, a complaint sufficient under the rules of pleading and practice governing that court is sufficient in the circuit court on appeal. p. 194.
3. **JUSTICE OF THE PEACE.—Pleading.—Complaint.—Sufficiency.**—Where an action is commenced before a justice of the peace, a complaint sufficient in substance to apprise the adverse party of the nature of the demand, and to bar another action for the same thing, is sufficient even as against demurrer. p. 194.
4. **NEW TRIAL.—Grounds.—Ruling on Demurrer.**—Overruling a demurrer to a complaint is not a cause for a new trial. p. 195.
5. **APPEAL.—Briefs.—Waiver of Error.**—Grounds for a new trial are waived by appellant’s failure to address any proposition or point thereto in his brief. p. 195.
6. **APPEAL.—Review.—Instructions.—Record.**—To authorize a consideration of the action of the trial court in giving and refusing instructions, they must be brought into the record by a substantial compliance with one of the methods provided by statute therefor. p. 195.
7. **APPEAL.—Presenting Questions for Review.—Instructions.—Making Part of Record.—Filing.**—To make the instructions a part of the record in a civil case without a bill of exceptions, the record must affirmatively show that they were filed in open court, and an order to file appearing in the record is not sufficient to satisfy that requirement. p. 195.
8. **APPEAL.—Presenting Questions for Review.—Instructions.—Making Part of Record.—Statute.**—It is essential, in order that requested instructions become a part of the record without a bill of exceptions that the record show that they were filed as required by §558 Burns 1914, §533 R. S. 1881 and §561 Burns 1914, Acts 1907 p. 652. p. 196.
9. **APPEAL.—Presenting Questions for Review.—Instructions.—Making Part of Record.—Statute.**—Where appellant attempted to save his exceptions with reference to instructions under §561 Burns 1914, Acts 1907 p. 652, providing that the court shall indi-

Glasser v. Jones—68 Ind. App. 192.

cate before instructing the jury, by a memorandum in writing at the close of the instructions requested, the numbers of those given and of those refused, and that such memorandum shall be signed by the judge, a failure to comply with the statute is fatal to a consideration of the instructions, and they cannot be identified by marginal notes in the transcript nor by a memorandum following each signed by appellant's attorney. p. 197.

From St. Joseph Circuit Court; *Walter A. Funk*, Judge.

Action by William H. Jones against Israel Glasser. From a judgment for plaintiff, the defendant appeals. *Affirmed*.

Charles Weidler, Orie Parker and Samuel B. Pet-tengill, for appellant.

Eli F. Seebirt and Daniel D. Schurtz, for appellee.

BATMAN, J.—In this action appellee filed a complaint against appellant before a justice of the peace of St. Joseph county to recover damages for an injury to his mare.

Omitting the formal parts, the complaint is as follows: "That the defendant is the keeper of a livery stable in the city of South Bend, St. Joseph county, Indiana, and that on the 3rd day of April, 1915, plaintiff entrusted to defendant's keeping a mare owned by the plaintiff, and that plaintiff paid the defendant for the feeding and keeping of said mare; that when plaintiff demanded of the defendant said mare defendant delivered her to plaintiff with one limb broken; that said injury rendered said mare wholly worthless; that the value of said mare was \$150.00." The cause was tried before the justice of the peace, resulting in a judgment in favor of appellant. From this judgment appellee appealed to the circuit court of St. Joseph county, where appellant filed a demur-

rer to the complaint for want of sufficient facts. This demurrer was overruled. Appellant then filed an answer in two paragraphs, the first being a general denial, and the second alleged facts to show that the parties did not occupy the relation of bailor and bailee. On the issues thus formed a trial was had, resulting in a verdict against appellant for \$75, on which judgment was rendered.

Appellant filed a motion for a new trial, which was overruled, and has assigned the following errors in this court: (1) Insufficiency of the complaint to state a cause of action; (2) error of the court in overruling the demurrer to the complaint; (3) error of the court in overruling the motion for a new trial.

The first assigned error presents no question for our determination. *Pittsburgh, etc., R. Co. v. James* (1917), 64 Ind. App. 456, 114 N. E. 833. As

1. to the second assigned error it should be noted that this action was begun before a justice of the peace. Therefore we need only consider
2. the sufficiency of the complaint as a pleading in that court, notwithstanding the demurrer thereto was filed in the circuit court on appeal.
3. *Wabash, etc., R. Co. v. Lash* (1885), 103 Ind. 80, 2 N. E. 250. It is a well-recognized rule of pleading that, where an action is commenced before a justice of the peace, a complaint sufficient in substance to apprise the adverse party of the nature of the demand, and to bar another action for the same thing, is sufficient even as against a demurrer. *Helms v. Appleton* (1908), 43 Ind. App. 482, 85 N. E. 733, 86 N. E. 1023; *Brown v. Thompson* (1909), 45 Ind. App. 188, 90 N. E. 631; *Everett v. Irwin* (1910), 47 Ind. App. 263, 94 N. E. 352; *Gregory v. Redd*

(1913), 53 Ind. App. 629, 102 N. E. 140. The complaint is sufficient under this rule, and hence there was no error in overruling the demurrer thereto.

Appellant assigned the action of the court in overruling his demurrer to the complaint as one of his reasons for a new trial. This is not a recognized

4. cause therefor. *Decker v. Mahoney* (1917), 64 Ind. App. 500, 116 N. E. 57. He also alleges in his motion for a new trial that the verdict

5. of the jury is not sustained by sufficient evidence, and is contrary to law. These reasons

are waived by a failure to state any proposition or point with reference to the same. *Chesapeake, etc., R. Co. v. Jordan* (1916), 63 Ind. App. 365, 114 N. E. 461; *Continental Ins. Co. v. Bair* (1917), 65 Ind. App. 502, 114 N. E. 763, 116 N. E. 752.

The only remaining reasons assigned by appellant for a new trial relate to the action of the court in giving and refusing to give certain instructions.

6. Appellee contends that the instructions are not before the court, and that no question is properly raised with reference thereto. It is well settled that to authorize a consideration of the action of the trial court with reference to instructions they must be brought into the record by a substantial compliance with one of the methods provided by statute therefor. *Indiana Union Traction Co. v. Sullivan* (1913), 53 Ind. App. 239, 101 N. E. 401; *Indianapolis Traction, etc., Co. v. Gillaspay* (1914), 56 Ind. App. 332, 105 N. E. 242; *Indiana Quarries Co. v. Lavender* (1917), 64 Ind. App. 415, 114 N. E. 417, 116 N. E. 2.

In this case there is no attempt to bring the instructions into the record by a bill of exceptions. It

7 is also well settled that, in order to make the instructions a part of the record in a civil case

without a bill of exceptions, they must be filed in open court, and the record must affirmatively show that they were so filed. *Thompson v. Thompson* (1901), 156 Ind. 276, 59 N. E. 845; *Indianapolis, etc., R. Co. v. Ragan* (1909), 171 Ind. 569, 86 N. E. 966; *Thieme, etc., Brewing Co. v. Kessler* (1911), 47 Ind. App. 284, 94 N. E. 338; *Stimson v. Krueger* (1917), 63 Ind. App. 567, 114 N. E. 885. The only entry shown by the transcript relating to the filing of the instructions is as follows: "And the instructions that are given are now ordered signed, filed, and ordered made a part of the record, and are in these words, to wit: (Here follows what purports to be certain instructions.) It will be noted that this entry does not recite that the instructions were filed, but only recites that they were ordered filed. It has been held that an order to file is not sufficient, and that to become a part of the record, without a bill of exceptions, it must appear from the record that the instructions were in fact filed. *Indianapolis, etc., R. Co. v. Ragan, supra*; *Suloj v. Retlaw Mines Co.* (1914), 57 Ind. App. 302, 107 N. E. 18; *Roach v. Cumberland Bank* (1916), 60 Ind. App. 547, 111 N. E. 320. It will be further

8. noted that the entry contains no reference to the filing of the instructions requested by the parties, as required by §§558, 561 Burns 1914 (§533 R. S. 1881; Acts 1907 p. 652). This has been held to be an essential requirement. *Welker v. Appleman* (1909), 44 Ind. App. 699, 90 N. E. 35; *City of Indianapolis v. Schoenig* (1911), 48 Ind. App. 76, 95 N. E. 324. For the reasons stated we conclude that the instructions are not properly in the record.

There is a further reason why the alleged errors with reference to the instructions cannot be consid-

ered. All of such errors relate to the giving
9. and refusing of instructions requested by the parties. It appears from the manner in which appellant attempted to save his exceptions with reference to the court's action thereon that he was proceeding under §561 Burns 1914, *supra*. This section provides, among other things, that: "The court shall indicate, before instructing the jury, by a memorandum in writing at the close of the instructions so requested, the numbers of those given and of those refused, and such memorandum shall be signed by the judge." The apparent object of this provision is to furnish a means of identifying the instructions so given and refused. It has been held that a failure to comply with such provision when proceeding under said section is fatal to a consideration of such instructions. *Delaware, etc., Tel. Co. v. Fiske* (1907), 40 Ind. App. 348, 81 N. E. 1110; *Indianapolis, etc., Transit Co. v. Walsh* (1909), 45 Ind. App. 42, 90 N. E. 138; *Cleveland, etc., R. Co. v. Quinn* (1913), 54 Ind. App. 11, 101 N. E. 406. In this case the record fails to disclose any such memorandum signed by the judge, nor is there any other proper identification of the instructions so given and refused. True, there appears upon the margin of the record, opposite what purports to be certain instructions requested by the parties, the words "given" and "refused," but, as held in the case of *Brown v. Guyer* (1917), 64 Ind. App. 356, 115 N. E. 947, the marginal notes required by the rules of this court to be placed on the transcript cannot be made to supply the identification of the instructions given and refused, which is required to be shown by the record made in the trial court. Following each of said purported instructions is a

Grand Trunk, etc., R. Co. v. Thrift Trust Co.—68 Ind. App. 198.

memorandum dated and signed by one of appellant's attorneys, stating that appellant excepted to the ruling of the court thereon, but it is apparent that such memorandum cannot be taken as a substitute for an identification to be made by the court.

We find no error in the record. Judgment affirmed.

NOTE.—Reported in 120 N. E. 44. See under (2) 24 Cyc 736; (3) 24 Cyc 558.

GRAND TRUNK WESTERN RAILWAY COMPANY v. THRIFT
TRUST COMPANY, ADMINISTRATOR.

[No. 9,259. Filed April 6, 1917. Rehearing denied June 29, 1917.
Transfer denied June 22, 1918.]

1. PLEADING.—*Demurrer.—Memorandum.—Waiver of Objections.*—Section 344 Burns 1914, Acts 1911 p. 415, providing that defects in pleadings not specified in the memorandum accompanying the demurrer are waived, does not require a demurring party to print out in his memorandum every objection to a pleading which might be valid under any appealable theory upon which the pleading might be predicated, but only such infirmities as are necessary to make the pleading sufficient on the theory on which it is drawn, and it is only such defects that are waived under the statute by a failure to specify them in the memorandum; nor does the statute require the demurring party to suggest omissions or averments which might make such pleading sufficient upon some theory different from that on which it proceeds. p. 206.
2. APPEAL.—*Review.—Sufficiency of Pleadings.—Theory.*—A pleading must proceed on some definite theory which must be determined by its general scope and tenor, and the theory adopted by the trial court and the parties will generally be accepted and followed by the appellate tribunal. p. 207.
3. MASTER AND SERVANT.—*Injuries to Servant.—Federal Employers' Liability Act.—Scope and Applicability.*—The Employers' Liability Act, 35 Stat. at L. 65, §8657-8665, U. S. Comp. Stat. 1913, is exclusive within the scope of its operation, and it supersedes all state statutes within its scope and field, so that, where the facts of a particular case fall within its provisions, as where a

Grand Trunk, etc., R. Co. v. Thrift Trust Co.—68 Ind. App. 198.

servant's injuries are sustained while engaged in interstate commerce, the federal act alone controls. p. 213.

4. **APPEAL.—Complaint for Injuries to Servant.—Failure to Demur.—Waiver of Defects.—Presumptions.—Sufficiency of Evidence.**—In an action against a railroad company for the death of a servant, where defendant, in the memorandum accompanying its demurrer failed to include, as one of its grounds, that the complaint failed to aver that decedent was engaged in interstate commerce when injured, it cannot on appeal raise that objection by its contention that the cause of action is not proved because the uncontradicted evidence shows that decedent was so employed, where the facts pleaded in such complaint state a cause of action under either the state or federal statute, except that to make the complaint sufficient under the federal law it was necessary to have alleged that decedent was engaged in interstate commerce, and in such a case the trial court should treat the complaint as amended to correspond with the proof, and, on its failure to do so, the court on appeal may so treat the complaint. p. 213.
5. **APPEAL.—Reversal.—Grounds.—Presumption.**—Not every error committed by the trial court will furnish a ground for reversal, but only such as are prejudicial to appellant. p. 215.
6. **APPEAL.—Review.—Harmless Error.—Instructions.**—Where, under the state law, contributory negligence was a complete bar to recovery for the death of a railroad employe and under the federal Employers' Liability Act of 1908, 35 Stat. at L. 65, §§8657-8665 U. S. Comp Stat. 1913, was a ground for reducing damages only, instructions in an action for the wrongful death of a railroad employe, applying the state law on the issue of contributory negligence could not have harmed defendant, the law applicable to all other issues involved being the same under either the federal or state law. pp. 216, 226.
7. **MASTER AND SERVANT.—Injuries to Servant.—Action.—Contributory Negligence.—Burden of Proof.—Instructions.**—In an action against a railroad for the death of a servant, an instruction that, "if you find that the evidence on the issue of decedent's contributory negligence is evenly balanced or that plaintiffs have a preponderance of the evidence on that question, you should find for the plaintiff as to that proposition," was not objectionable as putting the burden on defendant of proving contributory negligence by its own evidence. p. 216.
8. **APPEAL.—Review.—Harmless Error.—Refusal of Instructions.—Contributory Negligence.**—Where, in an action for wrongful death, the instructions on contributory negligence precluding recovery in event the jury found that decedent was guilty of such negligence, and the general finding was for plaintiff on that issue, any error

Grand Trunk, etc., R. Co. v. Thrift Trust Co.—68 Ind. App. 198.

from refusal to give defendant's tendered instructions on the same subject was harmless, such tendered instructions being less favorable to defendant than those given. pp. 217, 226.

9. **APPEAL.—Excessive Damages.—Reversal.**—Where the amount of a verdict in an action for wrongful death is not so large as to show that the jury was influenced by bias or prejudice in making the award, the judgment will not be reversed on the ground that the verdict was excessive. p. 217.
10. **APPEAL.—Review.—Harmless Error.—Instructions Outside Issues.**—In an action against a railroad company for the death of a servant killed by a collision between an engine and a flat car on which he was standing, an instruction that defendant was not bound to ring the bell in shifting and coupling an engine to cars in the yard, although inapplicable to the evidence, was not prejudicial to defendant. p. 219.
11. **RAILROADS.—Negligence.—Instructions.—Inference from Evidence.**—The court may say in a proper case, as a matter of law, that ordinary care requires those operating a train to keep a lookout, and whether the court in a particular case is warranted in so instructing the jury depends on whether the facts are such as to authorize or justify but one inference, and that inference one which leads all reasonable men to say that ordinary care required such lookout. p. 219.
12. **MASTER AND SERVANT.—Injuries to Servant.—Negligence.—Duty to Maintain Lookout.—Instructions.**—In an action for the death of a railroad employe caused by a collision between an engine and a flat car on which deceased was standing, an instruction that defendant railway, knowing that men were to board the flat car and be carried out of the yards, was bound, in coupling an engine onto such flat cars, to keep proper lookout and use all reasonable precautions when approaching and coupling to prevent injury to any one on the cars, was not erroneous because telling the jury as a matter of law that it was defendant's duty to keep a lookout where the evidence was such as to justify the single inference that ordinary care required that such lookout be maintained. p. 220.
13. **APPEAL.—Review.—Harmless Error.—Instructions.—Contributory Negligence.**—In an action against a railroad company for the death of an employe killed by a collision between an engine and a flat car, an instruction that if the decedent was in the exercise of ordinary care "immediately prior" to the collision, there could be a recovery, was not prejudicial to defendant, where it appeared that decedent did not have time to take a position of safety on the car and whatever was done by him which could have constituted contributory negligence must have been done during

Grand Trunk, etc., R. Co. v. Thrift Trust Co.—68 Ind. App. 198.

the period intervening between the time he got on the car and the time he was injured, which was about one minute, so that he could not have been guilty of any negligence from the time he got on the car up and including the time of his injury which he was not guilty of immediately before the accident. p. 221.

14. **MASTER AND SERVANT.—Injuries to Servant.—Action.—Instructions.—Contributory Negligence.**—In an action against a railroad for the death of a servant, an instruction that, notwithstanding any negligence of defendant or its agent proximately contributing to decedent's injury, plaintiff could not recover, if decedent, "by the want of ordinary care, and by his own voluntary acts," contributes to the accident, the words "by his voluntary acts" following the word "and" served merely to repeat the thought already expressed in the preceding words, "and" being used in the sense of "that is to say," so that the jury could not have understood from such words that any burden other than proof of decedent's failure to use ordinary care was required of defendant to defeat the action, especially where such instruction, when read in connection with other subsequent instructions and in the light of the evidence, could not have misled the jury to defendant's prejudice. p. 223.

From Porter Circuit Court; *A. D. Bartholomew*, Judge.

Action by the Thrift Trust Company, administrator of the estate of Gustav Fritz, deceased, against the Grand Trunk Western Railway Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Crumpacker Bros., for appellant.

Daly & Freund, for appellee.

HOTTEL, J.—The facts which gave rise to the litigation resulting in this appeal are in substance as follows:

On October 29, 1912, Gustav Fritz was in the employ of appellant railway company, and while so employed received injuries which resulted in his death. He left surviving him as heirs and next of kin a widow and four children. The Thrift Trust Com-

Grand Trunk, etc., R. Co. v. Thrift Trust Co.—68 Ind. App. 198.

pany was appointed administrator of the estate of said decedent, and as such filed a complaint in the trial court in two paragraphs, in each of which it alleges that decedent's death was caused by appellant's negligence as therein specifically charged, and that on account thereof said widow and children had been damaged. A trial resulted in a verdict and judgment for appellee. From this judgment appellant appeals.

The questions which by its appeal it seeks to have reviewed in this court, stated in its own language, are as follows: "Appellant has assigned eight errors in this court but is only urging a reversal of the cause on account of the overruling of appellant's motion for judgment on the interrogatories and the answers * * * thereto, * * * and the overruling of appellant's motion for a new trial," which "is based substantially upon the following grounds: First: The verdict of the jury is contrary to law. Second: The verdict of the jury is not sustained by sufficient evidence. Third: The trial court erred in giving each of certain instructions given by the court to the jury of its own motion. Fourth: The trial court erred in refusing to give each of certain instructions that were tendered by appellant. Fifth: The answers of the jury to the interrogatories evince bias, prejudice and passion on their part and hence the jury was guilty of misconduct. Sixth: The damages awarded by the jury are exorbitant and excessive."

By most of said rulings the appellant seeks, by different methods, to present substantially the same question. We therefore go directly to a consideration and disposition of this question.

It is insisted by appellant, in effect, that each of

Grand Trunk, etc., R. Co. v. Thrift Trust Co.—68 Ind. App. 198.

the paragraphs of the complaint proceed upon the theory that a cause of action existed and is stated therein under the state law; that appellee and the court adopted this theory and pursued it to the end of the trial embodying it in the instructions given in the case; that the uncontradicted evidence disclosed that appellee's decedent when injured was engaged in interstate commerce; that for this reason the case was controlled by the federal Employers' Liability Act of April 28, 1908; that such act supersedes state laws upon the same subject and is exclusive within the scope of its operations. Upon the case assumed it is argued in effect that the cause of action stated in the complaint is not sustained by the evidence; that the decision is contrary to law; and that, in any event, the court erred in giving instructions that applied the state law to the facts proved, and in refusing to give instructions which applied the federal act, *supra*.

The averments common to each of the paragraphs of the complaint, pertinent to the question involved, are in substance as follows: Appellant on and previously to October 29, 1912, owned, operated and controlled a railroad and railroad right of way extending from South Bend, Indiana, through Porter county, and the city of Valparaiso, Indiana, to Chicago, Illinois. The part of the road extending through Valparaiso, east of Locust street therein, consisted of two main tracks and several side tracks with branches and connections. On October 29, 1912, decedent, Gustav Fritz, was in appellant's employ as a section hand or extra, under the direction of Paul Weimuth, who was in appellant's employ as foreman engaged in repairing of defendant's railroad tracks between the

Grand Trunk, etc., R. Co. v. Thrift Trust Co.—68 Ind. App. 198.

cities of Valparaiso and Chicago, Illinois, and decedent did such work and at such places as directed by Weimuth. Weimuth, as such foreman, had authority to employ men needed to keep appellant's tracks in repair in Valparaiso and vicinity and elsewhere, and to direct the men so employed what to do and how to do it, and to discharge them. The duties of decedent under his said employment required him to go where and perform such labors as directed by Weimuth *in the repairing of appellant's tracks* in Valparaiso and elsewhere and to do such work as might be required of him in connection therewith. On October 29, decedent was engaged, under said foreman, in repairing the north passing track of defendant's railway. At said time two of appellant's flat cars had been placed on its side track next to and south of the toolhouse to receive supplies and appellant's section hands to be taken elsewhere on said cars to repair appellant's tracks. At said time the engine had been detached from said cars. Decedent was then directed by said foreman to board said flat car, and, in obedience to such direction, took a position standing on the rear end of the east flat car and near the west flat car. In approaching the flat car from the west, to board it, the view of the tracks to the west was obstructed by the appellant's toolhouse. While decedent was standing on the flat car, in exercise of due caution and diligence, appellant negligently ran a locomotive from the west on said track, at a high rate of speed, to wit, fifteen miles an hour, without ringing any bell or blowing any whistle, and struck the west flat car with great force, pushing said flat car suddenly and forcibly eastward from under decedent's feet, throwing him backward between the

Grand Trunk, etc., R. Co. v. Thrift Trust Co.—68 Ind. App. 198.

two flat cars, and the east trucks of the west flat car passed over his body, killing him immediately. Decedent was killed by the negligence of appellant's servants and employes in running said locomotive engine against said flat cars with great force and at a high rate of speed with the brakes and other appliances to control its speed out of repair and not in efficient working condition and without any warning to decedent.

The first paragraph contains additional averments to the effect that appellant at the time in question had in force certain rules and regulations regulating the coupling of cars which were alleged to have been violated and also alleges the existence of an ordinance in force in the city of Valparaiso limiting the speed of trains operated therein to ten miles an hour.

Each of said paragraphs was challenged in the trial court by a demurrer for want of facts, accompanied by a memorandum, the same as to each paragraph, and containing the following grounds: "The negligence charged is that of a fellow servant and fellow servants of plaintiff's decedent. There are no allegations in the complaint bringing it within the terms of any statute, state or federal, changing the common-law rule as to liability, and from the facts alleged in the complaint plaintiff's decedent was a fellow servant of the employes of the decedent for whose acts it is sought to hold the defendant liable."

The rulings on said demurrer are not here challenged, but, on the contrary, the effect of appellant's contention in this court is to concede that each of said paragraphs is sufficient under the state law, but insufficient under the federal act, *supra*, because of the absence of an averment that appellant was en-

Grand Trunk, etc., R. Co. v. Thrift Trust Co.—68 Ind. App. 198.

gaged in interstate commerce, and that decedent, when injured, was engaged in such commerce, or in work connected therewith. This position is, in a sense, forced. We say this because appellant failed to include in his memorandum accompanying said demurrer any grounds of objection suggesting the omission of said averment that decedent, when injured, was engaged in interstate commerce, and hence, unless it can be said that each of said paragraphs proceed upon some theory other than a liability under said federal act, appellant, under the present demurrer law, §344 Burns 1914, Acts 1911 p. 415, would not now be heard to complain of the sufficiency of such complaint because of its failure to allege said fact.

Whether, however, in view of the requirements of said §344, *supra*, appellant, in order to obtain the benefits of the question he is now seeking to

1. raise, should have included in the memorandum accompanying his said demurrers said objection, presents a more serious question. It would, of course, be unreasonable to say that it was intended by said section to require a demurring party to point out every objection, to the pleading demurred to, which might be valid under any supposable theory upon which a pleading might be predicated. By his failure to demur a party thereby waives only those averments necessary to make the pleading involved sufficient on the theory upon which such pleading is predicated, and in his memorandum accompanying his demurrer the demurring party need only point out the infirmities or omissions necessary to make the pleading sufficient on the theory upon which it is predicated, and a failure to point out in such memo-

Grand Trunk, etc., R. Co. v. Thrift Trust Co.—68 Ind. App. 198.

random any infirmity or omission in such pleading necessary to its sufficiency against demurrer on the theory upon which it proceeds operates as a waiver of such infirmity or omission, but such statute imposes no duty upon the demurring party to suggest omissions or averments which might make such pleading sufficient upon some theory different from that on which it proceeds. And, generally

2. speaking, a pleading must proceed on some certain definite theory, and that theory must be determined by its general scope and tenor. The theory adopted by the court and the parties in the trial of the case will generally be accepted and followed by the appellate tribunal. *Euler v. Euler* (1914), 55 Ind. App. 547, 102 N. E. 856.

It will be observed that each paragraph of the complaint here involved alleged that appellant's road ran from the city of South Bend, in the State of Indiana, to the city of Chicago, in the State of Illinois. It also alleges that decedent, on the morning of his injury, was engaged in repairing one of the passing tracks when he was directed to board the car from which he was thrown and injured. There are averments also which show that the material loaded on said car upon which appellant was directed to take passage and the men thereon were to be taken along appellant's main line between Valparaiso and Chicago, *to be used in repairing appellant's tracks*. These averments, to say the least, strongly tend to show that each paragraph of the complaint proceeded on the theory of liability under said federal act. Upon this question the Supreme Court, in the case of *Vandalia R. Co. v. Stringer* (1915), 182 Ind. 676, 681, 106 N. E. 865, 107 N. E. 673, said: "Therefore in

Grand Trunk, etc., R. Co. v. Thrift Trust Co.—68 Ind. App. 198.

stating that the action must be brought and recovery had under the state law where the injury occurs in intrastate commerce, or under the federal act where the injury occurs in interstate commerce, it is not meant to say that the plaintiff shall specifically plead or refer to the state statutes in the one case or the federal act in the other. The proper procedure is to plead the facts, and a recovery may then be had accordingly as the evidence may develop a case under the one or the other." See, also, *Southern R. Co. v. Howerton* (1914), 182 Ind. 208, 105 N. E. 1025, 106 N. E. 369; *Grow v. Oregon, etc., R. Co.* (1913), 44 Utah 160, 138 Pac. 398, Ann. Cas. 1915B 481; *Pederson v. Delaware, etc., R. Co.* (1913), 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C 153; *Jorgenson v. Grand Rapids, etc., R. Co.* (1915), 189 Mich. 537, 155 N. W. 535, 536; *San Pedro, etc., R. Co. v. Davide* (1914), 210 Fed. 870, 127 C. C. A. 454; *Zikos v. Oregon, etc., Navigation Co.* (1910), 179 Fed. 893; *Central R. Co. v. Colasurdo* (1911), 192 Fed. 901, 113 C. C. A. 379; *Louisville, etc., R. Co. v. Kemp* (1913), 140 Ga. 657, 79 S. E. 558; *Jones v. Chesapeake, etc., R. Co.* (1912), 149 Ky. 566, 149 S. W. 951.

Appellant concedes and states that the record discloses the following facts: "On the morning that the decedent was killed and up to a short time prior to his death he was engaged in the repair of the north passing track of appellant's railroad in the city of Valparaiso, which at the time was being used by appellant in the running of interstate trains. Shortly before the decedent was killed, he was directed to go with the work train which was being made up in appellant's yards in the city of Valparaiso, and for that purpose got upon a flat car which was to be in-

Grand Trunk, etc., R. Co. v. Thrift Trust Co.—68 Ind. App. 198.

corporated into the work train, he was thrown therefrom and killed. Immediately before and for a short time prior to the time he was killed, decedent was standing on the flat car waiting for the engine to couple onto the same and make it a part of the work train. The work train crew was intending to distribute materials along appellant's main tracks westwardly from the city of Valparaiso to be used in the installation of an automatic block signal system, which said tracks of appellant were then being used for the purpose of interstate commerce and for the carrying of freight and passengers for hire between the States of Indiana, Illinois and Michigan. Said automatic block signal system was designed and intended to regulate and facilitate the running of trains over the tracks of appellant's railroad which at the time were being used in commerce between the states mentioned."

Appellant's contention that these facts show that decedent was engaged in interstate commerce at the time he was killed is supported by many of the decided cases. *Grow v. Oregon, etc., R. Co., supra*; *Jorgenson v. Grand Rapids, etc., R. Co., supra*; *Pederson v. Delaware, etc., R. Co., supra*; *McIntosh v. St. Louis, etc., R. Co.* (1914), 182 Mo. App. 288, 168 S. W. 821; *Horton v. Oregon, etc., Navigation Co.* (1913), 72 Wash. 503, 130 Pac. 897, 47 L. R. A. (N. S.) 8; *Central R. Co. v. Colasurdo, supra*; *Southern R. Co. v. Howerton, supra*; *San Pedro, etc., R. Co. v. Davide, supra*; *Zikos v. Oregon, etc., Navigation Co., supra*; *Louisville, etc., R. Co. v. Kemp, supra*.

However, evidence establishing said facts was admitted without objection, and the record in this respect cannot be said to lend any support to ap-

Grand Trunk, etc., R. Co. v. Thrift Trust Co.—68 Ind. App. 198.

pellant's contention that the parties and the trial court tried the case on the theory that the complaint attempted to state a cause of action under the state law rather than under the federal law.

Assuming, however, that appellant is right in its contention that each paragraph of the complaint proceeds on the theory of a liability under the state law (and in this connection it should be stated that such seems to be the theory adopted by the trial court in its instructions), and assuming further that the proof, if it shows any liability against appellant, shows a liability under the federal act, we would still be authorized by the decisions of courts of other jurisdictions *in holding* that appellant is in no position to claim that the cause of action pleaded was not proved, and the cause of action proved was not pleaded. *Chicago, etc., R. Co. v. Wright* (1916), 239 U. S. 548, 36 Sup. Ct. 185, 60 L. Ed. 431; *Hogarty v. Philadelphia, etc., R. Co.* (1914), 245 Pa. St. 443, 91 Atl. 854, 856, 857; *St. Louis, etc., R. Co. v. Coke* (1915), 118 Ark. 49, 175 S. W. 1177; *McIntosh v. St. Louis, etc., R. Co.*, *supra*; *Carpenter v. Kansas City, etc., R. Co.* (1915), 189 Mo. App. 164, 175 S. W. 234.

As pertinent and applicable to this question, we quote from the case of *Hogarty v. Philadelphia, etc., R. Co.*, *supra*, 450. Following a review of cases cited, the court said: "These United States decisions establish that this broad, general act of Congress supersedes the laws of the states upon all matters within its scope; and that, so long as it remains upon the books, in cases involving accidents happening upon interstate railroads, to employees engaged in interstate commerce, such state laws must be viewed as though nonexistent. This is the key to the whole

Grand Trunk, etc., R. Co. v. Thrift Trust Co.—68 Ind. App. 198.

situation; and it readily explains the Wulf decision, * * *. (*Missouri, etc., R. Co. v. Wulf* [1913], 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B 134.)

“In allowing the plaintiff in that case to proceed as though the federal statute had been originally pleaded, there was no departure ‘from law to law,’ as in the Wyler Case (*Union Pacific R. Co. v. Wyler* [1894], 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983.); for where in a particular class of cases but one law exists and can by any possibility apply, ex necessitate, there can be no departure from ‘law to law.’ This principle also distinguishes our own case of *Allen v. Tuscarora Val. Ry. Co.*, 229 Pa. 97, relied upon by the defendant.” After distinguishing the case being considered from the other cases, the court proceeds as follows: “But in the present instance the plaintiff simply relied upon the relevant general principles, or rules of law, whatever their source, applicable to the whole class of cases to which his cause belonged; and, as we have already pointed out, since those established by the federal statute cover the field and apply to the exclusion of ordinary state common law rules and statutory provisions, there could be no departure from ‘law to law.’ Further, in order to support the plaintiff’s case in chief, he did not depend upon or desire to plead any statutory regulation requiring the proof of a certain defined condition of fact; hence, there was no departure from ‘fact to fact,’ as in *Allen v. Tuscarora Ry. Co.*, *supra*.

“* * * when we consider that the plaintiff’s case in chief did not depend upon any specific and peculiar statutory regulation, * * * that he is a person bound by and entitled to all the benefits of the

Grand Trunk, etc., R. Co. v. Thrift Trust Co.—68 Ind. App. 198.

federal statute, that his declaration is entirely consistent with an action under that statute, and that the law thereby established is the only law that could by any possibility apply to his cause, it becomes plain that he could rely upon the provisions of the act of Congress forbidding the defense here interposed.

* * *

“In this particular instance, * * * no one can suffer any real harm, or plead surprise, even in the strict legal sense of that term, if the case is treated as though expressly brought under the act of 1908, * * *; for the defendant is an interstate road, and it admitted at trial that plaintiff was * * * engaged in interstate commerce * * *, so we may fairly assume that it had this knowledge from the first.”

The cases of *McIntosh v. St. Louis, etc., R. Co.*, *supra*, and *Carpenter v. Kansas City, etc., R. Co.*, *supra*, are also decisive of the question under consideration.

While appellant cites some cases which seem to support its conclusion, they are explained or distinguished in the more recent cases, all of which seem to be in harmony with the conclusion reached in the case just quoted from. Where, in cases which are controlled by the federal act, the defendant fails to demur to a complaint, or where, as in the instant case, it demurs, but in its memorandum accompanying such demurrer it fails to object to the sufficiency of the complaint on the ground of the absence of averments showing that defendant was engaged in interstate commerce, and that the plaintiff at the time he received his injuries was likewise engaged, the waiver of such objections to the complaint which

Grand Trunk, etc., R. Co. v. Thrift Trust Co.—68 Ind. App. 198.

results from §344, *supra*, of our demurrer law, furnishes an additional reason for the adoption by the courts of this state of the rule and conclusion announced in the cases last cited and quoted from *supra*.

It must be, and is, practically conceded by appellant that the facts pleaded in each of said paragraphs of complaint state a cause of action under

3. either the state or federal statute, subject to the condition only that to make the complaint sufficient under the federal law it was necessary to have alleged that appellant was engaged in interstate commerce, and that decedent, when he received the injury resulting in his death, was likewise so engaged. The facts pleaded, therefore, showed a liability either under state law or said federal act, depending on whether decedent, at the time of his injury and death, was engaged at a work connected with intrastate or interstate commerce. The authorities all agree and appellant concedes that the federal law is exclusive within the scope of its operation. It is the same as though it were a part of the state law, and it supercedes and takes the place of all state statutes within its scope and field, so that, where the facts of a particular case fall within its provisions, there is but one law which controls the case, and in this respect such a case is distinguishable from one the facts of which may create liability under either of two laws different in their scope and tenor.

Nobody knew better than appellant whether decedent, when injured and killed, was engaged in interstate commerce, and it also knew that, if he

4. was in fact so engaged, he had and could have but one cause of action, viz., the one provided by the federal act, and hence that one of the aver-

Grand Trunk, etc., R. Co. v. Thrift Trust Co.—68 Ind. App. 198.

ments essential to a statement of such cause of action was the averment indicated. It would seem, therefore, that in its memorandum accompanying its demurrer to said paragraph of complaint, appellant should have included, as one of the grounds thereof, the objection that each of said paragraphs omitted the averments that appellant was engaged in interstate commerce, and that decedent was so engaged when injured, and, having failed to make such objection, he should not now be permitted, in the manner here attempted, to take advantage of the fact that proof was made of such absent averment. By what we have said we do not mean to be understood as holding that, in a case where the complaint is predicated on the state law and the undisputed evidence shows it to be controlled by the federal act, the latter act should not be applied to and control such case unless the railroad company has by its demurrer to such complaint suggested as one of its infirmities the absence of an averment that the injured party was engaged in interstate commerce at the time of his injury, but what we do hold is that in such a case, under the authorities which we have cited, *supra*, such defendant is in no position to insist that the cause of action pleaded has not been proved, and that the cause of action proved has not been pleaded, but in such a case the trial court should treat the complaint as amended to correspond with the proof, and, if it fails to do so, this court may so treat the complaint. We think that such conclusion is in harmony with, and supported by, recent cases of the Supreme Court. *Southern R. Co. v. Howerton, supra; Vandalia R. Co. v. Stringer, supra.*

It follows that, when this complaint is so treated,

Grand Trunk, etc., R. Co. v. Thrift Trust Co.—68 Ind. App. 198.

those grounds of appellant's motion for new trial which challenge the verdict on the ground that it is not sustained by sufficient evidence and is contrary to law are unavailable and present no reversible error.

For the same reason no available error resulted from the overruling of the motion for judgment on the answers to interrogatories. Nor can we say that the answers to said interrogatories evince any bias, prejudice, or passion on the part of the jury as claimed by appellant.

It remains to be determined whether any available error is presented by the instructions given or refused. In this connection it should be stated that the court expressly instructed the jury that there was no evidence to support the charge in the complaint that appellant's engine was out of repair, and that as to such allegation its finding should be for appellant. The court also told the jury that appellant's decedent "assumed the ordinary risks incident to the service in which he was engaged after the defendant had used proper care, diligence and caution for his safety and protection commensurate with the danger to be reasonably apprehended from the service.

The law applicable to all other issues involved in the case was the same under either the state or federal law, except as to the question of contribu-

5. tory negligence. Indeed, appellant makes no complaint as to any instructions given by the court, except those affecting the question of contributory negligence. It is not every error committed by the trial court that will furnish a ground for reversal, but only such as are prejudicial to the complaining party.

Grand Trunk, etc., R. Co. v. Thrift Trust Co.—68 Ind. App. 198.

Upon the subject of contributory negligence the state law was more favorable to appellant than the federal statute, in that such negligence was a

6. complete bar to recovery under the former act, while under the latter act it furnished a ground for the reduction of damages only. Appellant could not, therefore, have been harmed by the application of the state law to such issue. *Southern R. Co. v. Howerton, supra*; *Chicago, etc., R. Co. v. Wright, supra*; *McIntosh v. St. Louis, etc., R. Co., supra*; *Chicago, etc., R. Co. v. Gray* (1915), 237 U. S. 400, 35 Sup. Ct. 620, 59 L. Ed. 1018.

Appellant, however, insists that the instructions given on this subject were not in accord with the state law. Instruction No. 14 on this subject is complained of as being mandatory, and as containing an element not proper in such an instruction. The instruction is not mandatory except in the sense that it tells the jury that the appellee cannot recover if the jury finds certain facts, and when read in connection with instructions Nos. 9 and 10, could not have been misunderstood by the jury, and was not prejudicial to appellant.

Instruction No. 15, complained of by appellant, states the law correctly as to the burden of proof on such issue. *Central Vermont R. Co. v. White*

7. (1915), 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B 252. It is not subject to appellant's contention that it puts upon appellant the burden of proving such issue by its *own* evidence, but, on the contrary, tells the jury that "if you find that the evidence on the question of decedent's contributory negligence is evenly balanced, or that the plaintiffs have a preponderance of the evidence upon

Grand Trunk, etc., R. Co. v. Thrift Trust Co.—68 Ind. App. 198.

that question, you should find for the plaintiff as to that proposition.”

Our examination of the instructions given convinces us that appellant has no reason to complain of them. Its ground of complaint, if it has any

8. valid ground therefor, must rest upon the refusal to give the instructions which it tendered on the subject of contributory negligence, which are to the effect that, if the jury found that decedent was guilty of negligence contributing to his injury, it should reduce appellee's recovery in a ratio proportionate to the relative ratio which such negligence contributed to decedent's injury, as compared with appellant's negligence causing such injury.

As before indicated, the court gave instructions which precluded recovery in case the jury found that decedent was guilty of such negligence, and its general finding for appellee was a finding in its favor on such issue, and hence rendered harmless any error resulting from the refusal to give said tendered instructions.

The amount of the damages assessed by the jury, when viewed in the light of the evidence affecting such question, is not excessive in the sense that this

9 court would be justified in concluding that the jury was influenced by bias or prejudice in making such assessment, and hence under the repeated decisions of the Supreme Court and this court the last ground of appellant's motion for new trial indicated *supra* furnishes no cause for reversal.

Finding no error in the record, the judgment below is affirmed.

ON PETITION FOR REHEARING.

HOTTEL, C. J.—Appellant has filed a petition for rehearing accompanied by briefs in which it very earnestly presses upon the court not only that it has erred in its opinion rendered herein, but that it has failed to decide certain questions presented by appellant in its original brief, and has misinterpreted, and in some respects misstated, its case, and its contention in reference thereto.

As to appellant's main and, in our judgment, controlling contention in the case, viz., that each paragraph of the complaint proceeds upon the theory that a cause of action is stated therein under the state law, that appellee and the trial court adopted such theory and pursued it to the end of the trial, embodying it in the instructions given in the case, whereas the uncontradicted evidence shows that decedent, when injured, was engaged in interstate commerce, and hence that whatever cause of action existed in favor of appellee was controlled by the federal statute, we desire to add nothing to the original opinion. As affecting the question presented by such contention, we think the conclusion announced in the opinion is supported by both reason and authority.

Appellant directs our attention to a statement in our original opinion which should be qualified, as will appear from what follows. We said that "appellant makes no complaint as to any instruction given by the court, except those affecting the question of contributory negligence." As being at variance with this statement, our attention is called to instruction No. 11, not mentioned in our original opinion. This instruction was objected to in the original brief, and

Grand Trunk, etc., R. Co. v. Thrift Trust Co.—68 Ind. App. 198.

it and the objection thereto will now be considered and determined.

Such instruction is as follows: "The court instructs the jury that the defendant railway company is not bound to whistle or ring the bell in shifting and coupling the engine to the cars in the yards, but nevertheless the jury are instructed that said defendant railway company, knowing that men were to board said flat cars and be carried out of the yards, was bound, in coupling the engine onto said flat cars, to keep proper lookout and use all reasonable precautions when approaching and coupling on the engine to said flat cars to prevent injury to anyone on said flat cars."

It is insisted that there was no issue tendered by the pleadings and no evidence to which this instruction was applicable, that it is peremptory in character and tells the jury as a matter of law that it was the duty of appellant to keep a lookout.

In so far as the instruction related to the signals which the law requires to be given at railroad crossings, it was inapplicable to the evidence, but

10. this part of the instruction was favorable, rather than harmful, to appellant. That part of the instruction requiring a proper lookout
11. was, we think, pertinent to the issues and the evidence, but whether it was a correct statement of the law presents a more serious question. It probably would have been more accurate for the court to have told the jury that in approaching with the engine to couple it on said freight cars, the appellant was required to use ordinary care to prevent injury, etc., but it will be observed that the instruction assumes as a fact upon which a duty to keep a

Grand Trunk, etc., R. Co. v. Thrift Trust Co.—68 Ind. App. 198.

lookout is predicated, that appellant knew that some of its employes were to board said cars. No objection is made to this assumption, nor is it claimed that it was unwarranted by the evidence. The effect of this part of the instruction was to tell the jury that under the facts assumed ordinary care required appellant "to keep a proper lookout and exercise all reasonable precautions when so approaching" with and coupling its engine, etc. There are cases in which the court may as a matter of law say that ordinary care requires a certain thing to be done, as where the traveler is about to cross a railroad track, etc. So we think the court may with equal propriety, under certain circumstances, say that those operating the train should keep a lookout. Whether the court in the particular case is warranted in so instructing the jury depends on whether the facts of such case are such as to authorize or justify but one inference, and that inference one which leads all reasonable men to say that ordinary care would require such "lookout." *McIntyre v. Orner* (1905), 166 Ind. 57, 76 N. E. 750, 4 L. R. A. (N. S.) 1130, 117 Am. St. 359, 8 Ann. Cas. 1087; *Cole v. Searfoss* (1911), 49 Ind. App. 334, 97 N. E. 345, and cases cited.

We believe, under said fact assumed in the instruction, about which there seems to have been no dispute in the evidence, that the instruction was

12. authorized. As supporting this conclusion, viz., that knowledge of the presence of those who will be exposed to danger creates the duty to keep a lookout, see *Cleveland, etc., R. Co. v. Means* (1915), 59 Ind. App. 383, 104 N. E. 785, 108 N. E. 375, and cases there cited; *Palmer v. Oregon, etc., R. Co.* (1908), 34 Utah 466, 98 Pac. 689, 16 Ann. Cas. 229;

Grand Trunk, etc., R. Co. v. Thrift Trust Co.—68 Ind. App. 198.

note, 8 L. R. A. (N. S.) 1076; note, 41 L. R. A. (N. S.) 267, 271 *et seq.*

Appellant complains because we failed to indicate or discuss instruction No. 8 in our opinion. This instruction is as follows: "If you find from

13. the evidence that Savory was on the 29th day of October, 1912, an engineer in the employ of the defendant railway company and had charge of the engine which collided with the flat cars upon one of which decedent was then standing; and if you further find that said engineer at said time ran said engine against said flat cars without using ordinary care to avoid injury to the plaintiff's decedent under all the circumstances as disclosed by the evidence, and if you further find that the colliding of said engine with said flat cars caused the decedent to fall from one of said flat cars and thereby meet his death, and if you further find that *immediately prior* to said collision, the decedent was in the exercise of ordinary care for his safety, then I instruct you that your verdict should be for the plaintiff."

Objection is made to the italicized portion of the instruction, it being insisted that contributory negligence on the part of decedent which proximately contributed to the injury, whether some time before or at the time of receiving the injury as well as that immediately before receiving the injury, was sufficient to defeat appellee's action. While the instruction is subject to appellant's criticism when viewed as an instruction to be given generally, it was no doubt induced by the particular facts of this case, and as applied to them was not prejudicial to appellant.

The only act or acts of decedent upon which any negligence on his part contributing to his injury

Grand Trunk, etc., R. Co. v. Thrift Trust Co.—68 Ind. App. 198.

could have been predicated, was his act in connection with getting on said flat car, and remaining so near the end thereof that he was liable to be thrown forward and between it and the cars which were to be attached to it, and his taking and keeping a standing position on said car facing the east with his back toward the engine which was to be coupled to said cars, and his failure, while in such position, to look in the direction of the train or engine which was to be coupled onto said cars.

The answers to interrogatories expressly find that just before decedent received the injury that resulted in his death two of the flat cars of appellant's work train, made up in said city of Valparaiso, were standing on one of appellant's switches or side tracks, known as the tie hole track; that one of said cars, the one to the west, was an empty flat car and the other loaded with angle bars. The engine was detached from said cars and the engine and crew were engaged in switching. While this was going on, decedent was directed by appellant's foreman and man in charge to get upon defendant's work train, and, pursuant to the instructions and directions of said foreman, decedent got upon one of said cars standing on said tie hole track. He got on the northwest corner thereof, about two feet from the west end and faced the east with his back to the west. About a minute thereafter decedent was thrown from said car toward the west and down on the track between the car on which he had been standing and the one west of it. The engine struck the west car for the purpose of coupling onto said cars, and the impact caused both of said cars to move, thereby throwing decedent toward the west and between them. The east truck

Grand Trunk, etc., R. Co. v. Thrift Trust Co.—68 Ind. App. 198.

of the west car ran over him and killed him; that decedent was standing on the car from which he was thrown immediately before he was killed; that there was no evidence whether he was standing on said car at the time it started toward the east for the purpose of running on the tie hole track; that he stood facing the east with his back to the west. Other answers follow which find in effect that decedent did not have time to take a position of safety on said car.

It thus clearly appears from these answers that whatever was done by decedent which could have constituted contributory negligence must have been done during the period intervening between the time he got on said car and the time he was injured, which the jury found to be about a minute. The jury also found that during such period decedent was standing facing the east with his back to the west. It follows that decedent could not have been guilty of any negligence from the time he got on said car up to and including the time of his injury, which he was not guilty of immediately before his injury, and hence that said instruction was clearly without prejudice or harm to appellant.

In our discussion of instruction No. 14 in our original opinion we said that it was complained of as being mandatory and as containing an element

14. not proper in an instruction. The latter ground of objection is in fact the only one made. The instruction is as follows: "The plaintiff cannot recover, notwithstanding there may have been negligence on the part of the defendant or its agents which have contributed to the accident, if he, by the want of ordinary care, *and by his own voluntary acts*, so far himself contributed to the accident, that but for this fact it would not have happened."

Grand Trunk, etc., R. Co. v. Thrift Trust Co.—68 Ind. App. 198.

Appellant's objections to this instruction as stated in its original brief, under its points and authorities, are as follows: "This instruction tells the jury that appellee could not recover if he (appellee's decedent), by want of ordinary care and by *his own voluntary acts*, so far himself contributed to the accident, that but for this fact it would not have happened. This is an erroneous instruction under *any* view of the law that might be taken."

"Even though the case is governed by the state law instruction No. 14 given by the court is erroneous. It is ambiguous, not a correct statement of the law and calculated to mislead and confuse the jury and cause them to believe that the evidence must show something in addition to contributory negligence on the part of the decedent in order to defeat a recovery."

We think the italicized words connected with what precedes by the word "*and*" served merely to repeat the thought or idea already expressed and intended to convey the same meaning, or were in explanation thereof. In other words, what the court said was in substance and effect the same as though it had said "if he, by the want of ordinary care," that it to say, "by his own voluntary acts so far himself contributed," etc., and hence the jury could not have understood from such words that any burden other than proof of decedent's failure to use ordinary care was required of appellant to defeat appellee's action.

That the word "*and*" is sometimes used in the sense indicated, see 2 Cyc 286, title "*And*"; *Smith v. City of Madison* (1855), 7 Ind. 86, 90; *Douglass v. State* (1897), 18 Ind. App. 289, 48 N. E. 9.

This instruction was not approved in the original

Grand Trunk, etc., R. Co. v. Thrift Trust Co.—68 Ind. App. 198.

opinion, but we refused to reverse the judgment on account of the giving of it because we thought that, when read in connection with other instructions which follow, and in the light of the evidence in this case, the jury could not have been misled thereby to appellant's prejudice.

By instruction No. 7 the jury was told that: "Negligence consists of the omission of that degree of care which a person of ordinary prudence would have exercised under all the circumstances of the case, if he knew at the time that the responsibility for any accident resulting from the omission of such care would be wholly his own. The care which a person of ordinary prudence would have exercised under such circumstances is always the test, but the degree of care which the law denominates ordinary care must always be in the proper proportion to the circumstances of known danger, if any, attending the undertaking, * * *."

We have already indicated instruction No. 8. By instruction No. 10 the jury was told that: "If the said Fritz at the time he was killed was not in the exercise of that degree of care which a person of ordinary prudence would have exercised under the same circumstances, his failure to so exercise that degree of care which a person of ordinary prudence would have exercised under the same circumstances would constitute negligence on his part, and if such failure on his part contributed proximately to his death the said Fritz would be deemed guilty in the law of contributory negligence."

It is true, as appellant says, that the instructions last quoted and referred to undertake to tell the jury what constitutes contributory negligence, and that

Grand Trunk, etc., R. Co. v. Thrift Trust Co.—68 Ind. App. 198.

No. 14, *supra*, is the only instruction given which tells the jury the effect of such negligence on appellee's right to recover. However, said instructions were all of a character to indicate and impress upon the jury that decedent's contributory negligence was an important and controlling factor in the case, and, when considered in their entirety, we think it would be imputing to the jury an unwarranted lack of intelligence and understanding to assume that it did not understand them to mean that, if they found from the evidence that decedent was guilty of negligence contributing to his injury and death, there could be no recovery by appellee.

In other words, we think said instruction stated the law of contributory negligence substantially correctly if the facts presented by the issues and the evi-

6. dence had made a case to which the state law was applicable, and, as upon such subject the state law is more favorable to appellant than the federal statute, appellant was not prejudiced by the application of the former law instead of the latter to such issues and evidence. *Chicago, etc., R. Co. v. Wright* (1916), 239 U. S. 548, 36 Sup. Ct. 185, 60 L. Ed. 431; *Chicago, etc., R. Co. v. Gray* (1915), 237 U. S. 400, 35 Sup. Ct. 620, 59 L. Ed. 1018, 35 Sup. Ct. 620.

For the reasons herein indicated, we think we were justified in the conclusion reached and stated in our original opinion, viz.: That "the court gave

8. instructions which precluded recovery in case the jury found that decedent was guilty of such negligence, and its general finding for appellee was a finding in its favor on such issue, and hence ren-

Showers Bros. Co. v. Davis—68 Ind. App. 227.

dered harmless any error resulting from the refusal to give appellant's said tendered instructions."

The petition for rehearing is therefore overruled.

NOTE.—Reported in 115 N. E. 685, 116 N. E. 756. Master and servant: burden of proving contributory negligence under federal Employers' Liability Act, 33 L. R. A. (N. S.) 1218; federal Employers' Liability Act as superseding state laws, 47 L. R. A. (N. S.) 47. Damages: excessiveness or inadequacy of verdicts for personal injuries resulting in death L. R. A. 1916C 820, as to section hands, 839. See under (2) 31 Cyc 84; (4) 12 C. J. 43; (7) 26 Cyc 7495; (12) 33 Cyc 1319.

SHOWERS BROTHERS COMPANY v. DAVIS.

[No. 9,502. Filed February 19, 1918. Rehearing denied June 28, 1918.]

1. **APPEAL.—Briefs.—Waiver of Error.**—An assignment of error not presented in appellant's briefs is waived. p. 229.
2. **NEW TRIAL.—Grounds.—Answers to Interrogatories.—Evidence.**—Though a fact found by an answer to an interrogatory is not sustained by the evidence, a new trial is not warranted on that ground unless the fact is one which is essential to the general verdict; but where answers to interrogatories indicate that the jury wholly disregarded the testimony so as to make out a case in favor of one party, a new trial should be granted. p. 232.
3. **MASTER AND SERVANT.—Injuries to Servant.—Action.—Verdict.—Answers to Interrogatories.—Evidence.—Sufficiency.**—In an action by a servant against the master for personal injuries, evidence held sufficient to sustain both the general verdict for plaintiff and most of the answers to the interrogatories, so that such answers were not subject to attack on the ground that the jury disregarded the evidence to find facts which would uphold the general verdict. p. 234.
4. **MASTER AND SERVANT.—Injuries to Servant.—Action.—Jury Questions.—Negligence and Contributory Negligence.—Statute.**—On an action brought under the Employers' Liability Act of 1911, Acts 1911 p. 145, §8020a et seq. Burns 1914, for injuries received by a servant who was struck by a small truck which he and the

Showers Bros. Co. v. Davis—68 Ind. App. 227.

foreman were operating, the negligence being predicated on the master's failure to furnish proper appliances and the act of the foreman in permitting the truck to run at a dangerous speed, where there was evidence tending to prove that plaintiff was doing the work required of him in the usual and customary way when injured, and that his injury resulted from the negligence of the foreman, who at the time was plaintiff's fellow servant, the question of the master's negligence and plaintiff's contributory negligence was for the jury. p. 235.

5. **APPEAL.—Review.—Verdict.—Conclusiveness.**—Where there is some evidence to sustain the findings of the jury they are conclusive on appeal. p. 236.
6. **APPEAL.—Review.—Harmless Error.—Refusal of Instructions.**—The refusal of requested instructions on subjects fully covered by instructions given is harmless. p. 236.
7. **EVIDENCE.—Opinion.—Admissibility.**—In an action against the master for injuries received by a servant who was struck by a small truck, which he and the foreman were using in removing lumber from a dry kiln where plaintiff contended that, because the tracks in the kiln were down grade, the master was negligent in not providing some appliance to check the speed of the trucks when being run down the track, the injured servant was, it appearing that he had been employed at such work for a number of years, competent to testify as to the use and effectiveness of certain appliances to stop the trucks, the matter not being one within the common knowledge or experience of ordinary men of average intelligence. p. 237.

From Lawrence Circuit Court; *Oren O. Swails*, Judge.

Action by Enoch Davis against Showers Brothers Company. From a judgment for plaintiff, the defendant appeals. *Affirmed*.

Jesse B. Fields and *Batman, Miller & Blair*, for appellant.

Stotesburg & Weathers, for appellee.

FELT, J.—This is a suit for damages for personal injuries, brought by appellee against appellant. The complaint in three paragraphs was answered by a general denial. A trial by jury resulted in a verdict

for appellee for \$3,000. With its general verdict the jury returned answers to interrogatories. Appellant's motion for a new trial was overruled, and judgment was rendered on the general verdict in favor of appellee.

Appellant has appealed to this court and assigned as error: (1) The overruling of appellant's demurrer to each paragraph of the complaint; (2) overruling of appellant's motion for judgment on the answers to interrogatories, notwithstanding the general verdict; (3) overruling appellant's motion for a new trial.

The first assignment of error is waived by failure to present the same in appellant's briefs.

The second assignment is in effect waived

1. by showing that the questions relied on arise under the motion for a new trial.

Appellant states in its brief that: "We do not contend that the answers to the interrogatories are in conflict with the general verdict, but insist that many of them are wholly unsupported by the evidence, and that the answers as a whole indicate that the jury, in making such answers, wholly disregarded the evidence."

The pleadings show that appellee was employed by appellant as a common laborer in its furniture factory in Bloomington, Indiana; that it employed more than five persons, to wit, several hundred men; that appellee worked under a foreman in said factory, named Drake, and was engaged in helping move lumber from appellant's dry kilns; that appellant provided certain carriages, trucks and tracks, which were used by its said employes in moving said lumber under the supervision and direction of said Drake.

In the first paragraph of the complaint it is alleged in substance that said devices for moving lumber were so arranged that when the carriage was placed at the door of the kiln, the tracks in the kiln and on the carriage formed a continuous track upon which a truck loaded with lumber could be propelled out of the kiln, onto said carriage, and thence to different parts of the factory; that the tracks in the kiln were down grade toward the door, and when a truck loaded with lumber was started toward the door, if the speed thereof was not checked, it was liable to run off of the carriage and injure employes engaged in the work of moving lumber as aforesaid; that on December 13, 1913, appellee was so employed by appellant and was working in said factory, and was subject to the orders and directions of said Drake, to whose orders and directions he was bound to, and did, conform and obey; that on said day said foreman ordered plaintiff, to assist in taking a truck load of lumber from said kiln and onto said carriage; that in pursuance of the orders and directions of said foreman plaintiff was holding the carriage in place to receive the truck, and said Drake was then and there engaged in letting the truck loaded with lumber, weighing about 3,000 pounds, down the track in the kiln and onto the carriage; that in so doing it was necessary, and customary in said factory, to ease such truck down the track, which fact was known to said Drake; that at the time aforesaid, while appellee and said foreman were so engaged as aforesaid, said Drake negligently failed to ease said truck down the track toward the carriage, and negligently started it down the track without easing or checking its speed, whereby it ran onto and off of said carriage and struck and injured

plaintiff, by breaking his leg and otherwise severely injuring him.

The substance of the charge of negligence in the second paragraph is that appellant negligently failed to furnish and equip said carriage with a check block or other appliance to stop the truck, which could have been done; that appellant knew of the need and absence of such device, or by the exercise of ordinary care might have known thereof in time to have supplied the same or discontinued the use of said carriage, and by so doing could have avoided the injury received by appellee.

The third paragraph contains the same general averments as the first and second paragraphs of complaint, and charges that the injury resulted from the combined acts of negligence alleged in the first and second paragraphs.

Appellant contends that, in answering certain interrogatories, "the jury entirely disregarded the evidence, and manifested a disposition to find facts, whether supported by the evidence or not, that would strengthen and uphold the general verdict."

The answers complained of are in substance as follows: That there was no evidence to show whether appellee prior to his injury had assisted in easing down such trucks by holding onto the north and south ends thereof; that it was not a part of appellee's duties so to do, and he did not know that holding onto the ends of the lumber was the only means of easing the truck down the track; that appellee could not by giving attention to his surroundings on the occasion of his injury have avoided the accident by observing an unobstructed space around and near him; that it was necessary for appellee to stand in front of the

moving truck, at the place where he was standing when injured, in order to perform the duty then required of him, because of the custom of chocking, and he was prevented from performing the duties required of him by holding onto the ends of the load of lumber; that he had to be in front of the truck to chock it, and he could not have performed the duty required of him by going to the end of the truck load of lumber; that appellee was not warned by a fellow workman just prior to his injury that he was in a place of danger; that he could not have avoided the injury by observing the lumber on the truck just prior to his injury because his duties prevented him from seeing the danger. Appellant in effect contends that the foregoing answers to interrogatories of which it complains manifest such flagrant disregard of the evidence as to entitle it to a new trial.

In *Jenney Electric Mfg. Co. v. Flannery* (1913), 53 Ind. App. 397, 415, 98 N. E. 424, this court, by Lairy, J., said: "Even though it be true that a fact

2. found by an answer to an interrogatory is not sustained by the evidence, this alone would not warrant the court in granting a new trial, unless such fact is one which is necessary to sustain the general verdict. If every fact necessary to sustain the general verdict is supported by evidence a new trial will not be granted because certain answers finding nonessential facts are not sustained by the evidence. It has been said that in cases where the answers to interrogatories were such as to indicate that the jury wholly disregarded the testimony and made answers so manifestly repugnant to each other as to indicate an intention to so distort the evidence as to make a case in favor of one party or the other regard-

Showers Bros. Co. v. Davis—68 Ind. App. 227.

less of the testimony, a new trial should be granted in the interest of justice. *Chicago, etc., R. Co. v. Kennington* (1890), 123 Ind. 409, 24 N. E. 137; *Chicago, etc., R. Co. v. Cobler* (1909), 172 Ind. 481, 87 N. E. 981; *South Shore Gas, etc., Co. v. Ambre* (1909), 44 Ind. App. 435, 87 N. E. 246. In this case the answers to interrogatories are not such as warrant the application of this rule. The facts necessary to support the general verdict are all sustained by evidence, and the facts found by the answers complained of were of such a character that the verdict can stand regardless of such answers."

Appellee testified, among other things: "That when a truck load of lumber was to be taken out of the kiln one man went in and let the car down and out, and that on the occasion of his injury Mr. Drake was performing that part of the work; that the cars would run down themselves when released if they were not "scotched" or "checked," or if the men let go of them; that the man letting the truck down could control it by holding onto it until it got down to the door, but if he let go it would come down in a hurry; that on the occasion of his injury there were no blocks or chocks on the carriage to stop the car and prevent it rolling off, but such devices could have been provided; and they would have prevented the car from running off as it did; that such blocks had been provided and were in use at the time of the trial; that it was a part of his work to line up the tracks at the door of the kiln, and he was helping in that part of the work when injured; that Drake was working in the kiln, letting the cars down to the door, and he had eased several down just before the one that hurt him; that Drake let that one get away from him, and

it came out so fast the men could not handle it; that it was appellee's duty to chock the car and help stop it, and he endeavored to do so by throwing strips under the wheels, "and it wouldn't take them that way. It just kept sliding as fast as I could throw them under there"; that he had stopped the other cars "just that way," and it was the way he had always done before; that when he was injured he was standing in the only place where he could stand to do the work he was required to do, and had stood at that place while doing such work for several weeks prior to his injury and all the time he worked in that division, which was about six weeks; that as soon as he saw they were not going to be able to stop the car he tried to get away by running as fast as he could, but the truck ran off the carriage and the lumber fell off thick and fast, and fell on him and injured him; that at the time appellant employed in and about said factory about 600 or 800 men; that said Drake brought all the orders to the gang in which he worked.

There is evidence tending to sustain every material allegation of the complaint, and the answers to the interrogatories of which appellant complains

3. do not as a matter of law entitle it to the relief demanded. While there was conflict in the evidence, the testimony of appellee shows that there was some evidence to sustain not only the general verdict, but most, if not all, of the answers to the interrogatories.

In answer to interrogatories other than those mentioned above, the jury found that appellee placed himself on the east side of the track, on the outside of the dry kiln, just prior to the time he received his alleged injuries; that it was the custom to ease the

trucks down by the men holding on to the lumber at the sides of the car and also to use chocks.

While there may be a measure of conflict in some of the answers, as a whole they are consistent with and support the general verdict.

Appellant also contends that the undisputed evidence shows appellee guilty of negligence which contributed to his injury; that the hazards which caused his injury were open and obvious to him, and his injury resulted from his failure to use his senses and apply the experience he had gained by doing the particular kind of work he was doing for many years prior to the time he was injured; that there was a safe way of doing the work he was required to do, and he voluntarily chose an unsafe way when a safe way was available and was the usual and customary way of doing the work appellee was required to do.

We cannot concur in appellant's view of the evidence. There is evidence tending to prove that appellee was doing the work required of him in

4. the usual and customary way when injured, and that his injury resulted from the negligence of appellant's foreman, Drake, who at the time was a fellow servant with appellee.

The first paragraph of complaint is based on the negligence of Drake in letting the truck go down the track without checking its speed in the usual and customary way.

The suit was brought and the case tried under the Employer's Liability Act of 1911, Acts 1911 p. 145, §8020a *et seq.* Burns 1914.

This act abrogates the rule by which an employe assumed the risk of a fellow servant, and likewise as to defects in the place of work, tools or other appli-

ances where such defects are known to the master, or could have been ascertained by the exercise of ordinary care in time to have remedied the defects or discontinued the use of the defective tool or appliance.

The questions of appellant's alleged negligence and of appellee's contributory negligence were for the jury. The jury having determined them

5. against appellant, and there being some evidence to sustain the findings of the jury, they are conclusive on appeal.

The facts of the case bring it within the provisions of the act aforesaid as interpreted by the Supreme Court and by this court. *Vandalia R. Co. v. Stillwell* (1914), 181 Ind. 267, 104 N. E. 289, Ann. Cas. 1916D 258; *Kokomo Brass Works v. Doran* (1915), 59 Ind. App. 583, 589, 105 N. E. 167; *Chicago, etc., R. Co. v. Mitchell* (1916), 184 Ind. 588, 110 N. E. 680; *Nordyke & Marmon Co. v. Hilborg* (1916), 62 Ind. App. 196, 110 N. E. 684; *American Car, etc., Co. v. Wyatt* (1914), 58 Ind. App. 161, 167, 108 N. E. 12.

Appellant also complains of the refusal of the court to give to the jury instructions Nos. 4, 5, 7, 12, 13 and 17 tendered by it. These instructions deal with

6. phases of the master's duty, proximate cause and contributory negligence. The subjects were fully covered by the numerous instructions given to the jury, some of which were tendered by appellant. In view of the clear and comprehensive instructions given the jury covering all the issues and every phase of the evidence, appellant was not harmed by the refusal of the court to give the instructions aforesaid.

While we have no doubt of the correctness of the

concluding proposition above announced, it is emphasized in this case by the answers of the jury to the interrogatories, which show clearly that, upon the hypothetical facts stated in the instructions tendered, the jury found against appellant. It further appears, also, that none of the instructions refused, if given, could have influenced in any way the findings of the jury upon such facts.

There is a suggestion of error in the exclusion of certain evidence, but our examination shows that the items complained of all refer to immaterial evidence or to matters clearly within the discretion of the court on cross-examination of witnesses.

It is also contended that the court erred in permitting appellee to testify over appellant's objection and exception, with reference to the use and effec-

7. tiveness of blocks to stop the trucks, as to the place or places where he could stand and do the work required of him, whether he would have been able to have stopped the car with the strip used by him, if Drake had eased it down in the usual and customary way until the other workmen could have gotten hold of it, and whether he believed the men would be able to stop the truck up to the time it became apparent to him that they could not do so.

Appellee was shown to have worked in the factory for six or eight years prior to his injury, and at this particular kind of work, with the same devices and appliances and the same men, for several weeks prior to his injury, and to have acquired a practical knowledge of his duties and the way the lumber was handled and moved from the kiln.

Considering his qualifications and the issues of the case, the subjects mentioned involved material

issuable facts, and appellee was a competent witness to testify in regard thereto.

The matters inquired about were not so clearly within the common knowledge, or experience of ordinary men of average intelligence, selected without reference to their learning, profession, trade, or calling, as to preclude the opinions of persons qualified as appellee is shown to have been. *Archer v. Ostermeier* (1914), 56 Ind. App. 385, 391, 392, 105 N. E. 522, and cases cited; *Federal Union Surety Co. v. Indiana, etc., Mfg. Co.* (1911), 176 Ind. 328, 333, 95 N. E. 1104.

We find no reversible error. The verdict is supported by the evidence under the rules of appellate procedure.

Judgment affirmed.

Ibach, C. J., Caldwell, Dausman and Hottel, JJ., concur. Batman, P. J., not participating.

NOTE.—Reported in 118 N. E. 697. See under (2) 29 Cyc 836; (4) 26 Cyc 1463, 1482; (8) 22 C. JJ. 542. Employers' liability acts, assumption of risk, 47 L. R. A. (N. S.) 62.

BRAYTON v. CITY OF RUSHVILLE.

[No. 9,868. Filed June 28, 1918.]

1. APPEAL.—*Review.*—*Briefs.*—*Requisites.*—Where error is assigned on the denial of the motion for a new trial, appellant's briefs must show an exception to the ruling of the court and the pages and lines of the record where the filing of the motion and the reserving of an exception to the ruling thereon may be found. p. 241.
2. APPEAL.—*Briefs.*—*Requisites.*—Appellant's brief must contain, under a separate heading of each error relied on, separately numbered propositions or points, stated concisely, and without argu-

Brayton v. City of Rushville—68 Ind. App. 238.

ment or elaboration, as required by Rule 22, cl. 5, of the rules of the Supreme and Appellate Courts. p. 241.

3. **APPEAL.—Briefs.—Rules of Court.—Scope.**—The rules of the court on appeal with reference to the preparation of briefs are binding upon the court as well as upon litigants. p. 241.
4. **APPEAL.—Failure to File Briefs.—Effect.**—Appellee's failure to file briefs on the merits of the cause does not, of itself, entitle appellant to a reversal as a matter of right, but only calls for an exercise of the court's discretionary power which should not be exercised against the judgment of the trial court, except where appellant's briefs show that reversible error was in fact committed. p. 242.
5. **MUNICIPAL CORPORATIONS.—Contracts.—Appropriations.—Statutes.**—Under §8639 *et seq.* Burns 1914, Acts 1905 p. 219, which divides all cities into five classes, cities of the fifth class are restricted in making contracts by the provisions regarding appropriations in the same manner as cities of other classes. p. 242.
6. **STATUTES.—Construction.—Construing as a Whole.**—It is a general rule of statutory construction that an act of the legislature must be construed as a whole. p. 243.
7. **MUNICIPAL CORPORATIONS.—Contracts.—Appropriations.—Statutes.**—Section 8687 Burns 1914, Acts 1905 p. 219, §85, providing that all contracts and agreements, express or implied, and all obligations of any and every sort beyond existing appropriations shall be void, applies to cities of the fifth class, such limitation on the power to contract not being restricted to executive departments, but applies to all contracts made in behalf of any city by whatever authority. p. 243.

From Rush Circuit Court; *Will M. Sparks*, Judge.

Action by Albert W. Brayton, Jr., doing business under the firm name of the State Forestry Company, against the city of Rushville. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

Harry C. Hendrickson, for appellant.

Kiplinger & Smith, for appellee.

BATMAN, J.—This is an action by appellant against appellee for labor performed and materials furnished under an alleged contract. After the joining of issues a trial was had by the court, resulting in a judgment in favor of appellee. Appellant filed a motion for a

new trial on the grounds that the decision of the court is not sustained by sufficient evidence and is contrary to law. This motion was overruled, and the action of the court in so doing is the sole error assigned and relied on for a reversal. The evidence shows, among other things, that appellant is a landscape gardener, and that appellee is a city of the fifth class; that appellee had a public park and a regularly appointed park committee; that the trees of said park were becoming decayed and dangerous to persons frequenting the same; that on June 17, 1913, the common council of appellee authorized said committee to secure the services of a landscape gardener; that thereafter, on June 25, 1913, the committee employed appellant to furnish the labor and material necessary to put the trees of the park in good and safe condition, and agreed to pay him the sum of sixty-five cents per hour for all labor performed in so doing and to pay for all material used in the work; that in pursuance to the employment appellant furnished labor and material amounting to the sum of \$493.55, which had never been paid; that prior to the making of the contract and prior to the performance of the labor and furnishing the material, and at no other time, had or has the common council of appellee made any appropriation for the purpose of paying for the labor or material, nor was there at said times, nor has there been at any time subsequent thereto, any unexpended balance of any appropriation made for such purpose, or out of which said labor and material could be paid.

Appellee contends that the brief of appellant fails to comply with the rules of this court in a number

Brayton v. City of Rushville—68 Ind. App. 238.

of respects, and for that reason no question is

1. presented for our determination. We note that appellant's brief does not show that any exception was taken to the ruling of the court on his motion for a new trial, nor are the pages and lines of the record given where the filing of such motion and the reserving of an exception to the ruling thereon may be found. These requirements have been held to be essential. *Cleveland, etc., R. Co. v. Beard* (1912), 52 Ind. App. 105, 100 N. E. 392; *Miller v. Ruse* (1913), 54 Ind. App. 25, 101 N. E. 343; *Vandalia Coal Co. v. Bland* (1915), 59 Ind. App. 308, 108 N. E. 176; *Morgan v. Arnt* (1917), 63 Ind. App. 590, 114 N. E. 986.

It does not contain "under a separate heading

2. of each error relied on, separately numbered propositions or points, stated concisely, and without argument or elaboration," as provided by the fifth clause of Rule No. 22. This is also an essential requirement. *Rook v. Straus Bros. Co.* (1916), 60 Ind. App. 381, 110 N. E. 1006; *Fish v. Hetherington* (1916), 61 Ind. App. 645, 112 N. E. 391; *Schowe v. Bower* (1917), 186 Ind. 29, 114 N. E. 689. Other alleged defects in appellant's brief are pointed

3. out, but no good purpose would be served in giving them consideration. It has been held that the rules with reference to the preparation of briefs are binding upon the court as well as upon litigants. *Albaugh Bros., etc., Co. v. Lynas* (1910), 47 Ind. App. 30, 93 N. E. 678; *Rook v. Straus Bros. Co., supra*; *Magnuson v. Billings* (1899), 152 Ind. 177, 52 N. E. 803. But appellant calls our attention to the fact that appellee has not attempted to brief the case on its merits, but has confined itself solely to pointing out alleged infirmities in his brief. This fact,

however, would not entitle appellant to a reversal of the judgment as a matter of right, even if his brief had been in strict compliance with the rules. The failure on the part of an appellee to file a brief on the merits of a cause only calls for an exercise of the discretionary powers of the court, which, it has been held, should not be exercised against the judgment of a trial court, except in cases where the appellant's brief shows that reversible error was in fact committed by such court. *Simon v. City of Wabash* (1915), 58 Ind. App. 127, 107 N. E. 738; *McClure v. Anderson* (1915), 58 Ind. App. 615, 108 N. E. 757.

In the instant case appellant has failed to show that the court committed any error on the trial of the cause. The main question which appellant has

5. sought to present relates to the power of a city of the fifth class to contract for labor and material, where no appropriation is made for the payment of the same. It appears to be appellant's contention that the power of such cities to contract is not restricted by the provisions of the statute with reference to appropriations. The provisions in this regard are found in the act of the general assembly of this state, approved March 6, 1905, entitled "An act concerning Municipal Corporations." Acts 1905 p. 219, §8639 *et seq.* Burns 1914. This act divides all cities into five classes, based on their population, and undertakes to provide a general scheme for their government. Certain provisions of this act are limited to designated classes, while those provisions not so limited are made to apply to all cities regardless of their class. An examination of the act as a whole leads us to conclude that cities of the fifth class are

restricted in making contracts by the provisions regarding appropriations the same as cities of

6 other classes. It is a general rule for the construction of an act that it must be construed as a whole. *Hasely v. Ensley* (1907), 40 Ind. App.

7. 598, 82 N. E. 809; *Vollmer v. Board, etc.* (1913), 53 Ind. App. 149, 101 N. E. 321. We call attention

to the following sections which relate to the subject under consideration and throw light on the intention of the legislature, reference being had to section numbers, as found in §§8654, 8655, 8658, 8659, 8681, 8682, 8684, 8685, 8687, 8688 Burns 1914. It will be observed that said §8687 contains, among others, the following provisions: "All contracts and agreements, express or implied, and all obligations of any and every sort, beyond such existing appropriations, are declared to be absolutely void." Appellant contends, however, that this provision has no application to cities of the fifth class. He bases this contention largely on the connection in which it is found. He cites the fact that it appears in the fourth section of an article of the act devoted to executive departments of cities of the first, second, third and fourth classes. As applicable to appellant's contention it should be noted that the first clause of said §8687 provides in clear and concise language that an executive department shall have no power to bind a city to any contract beyond the amount of money at the time already appropriated by ordinance for the purpose of such department. This clause is followed immediately by the one under consideration. It is not limited in its application by its terms to executive departments or to cities of any class, but it is broad enough to apply to contracts attempted to be made

on behalf of any city by whatever authority. It does not have the effect of placing any greater restrictions on the power of executive departments to contract than the preceding clause. It is therefore reasonable to presume that the purpose of the latter clause was to make it clear that the limitations on the power to contract was not restricted to executive departments, but to the officers of all cities of every class. This construction finds support in the limitations placed upon the drawing of warrants against the funds of any city, or issuing what purports to be an obligation of any city, as appears in §§8658, 8688 of the same act, which are as follows:

“No order or warrant for any purpose shall be drawn against the funds of any city, in the hands of the treasurer or other officer, unless an appropriation has been made by ordinance for such purpose and such appropriation is not exhausted, or unless such order or warrant shall be for a salary fixed by statute or ordinance, or in payment of a judgment which such city is compelled to pay, or for interest due on city bonds.” §8658, *supra*.

“Any city official who shall issue any bond, certificate or warrant for the payment of money, which shall purport to be an obligation of such city, and be beyond the unexpended balance of any appropriation made for such purpose, or who shall attempt to bind such city by any contract or agreement, or in any other way, to any extent beyond the amount of money at the time already appropriated by ordinance for such purpose, and remaining at the time unexpended except as in the last preceding section provided, shall be liable on his official bond to any person injured thereby, and shall be fined not more than one thou-

sand dollars, and imprisoned in the county jail not more than six months, either, or both.” §8688, *supra*. It will be noted that both of these sections apply to all cities regardless of their class, and the latter being under the same heading as said §8687, *supra*. If appellant's contention should be adopted, we would have a condition whereby the officials of a city of the fifth class could contract a debt which it could not voluntarily pay, because of the prohibitions contained in said §§8658, 8688, *supra*, but for which judgment with attendant cost could be recovered. We are convinced that the act in question should not be so construed.

We find no reversible error in the record. Judgment affirmed.

NOTE.—Reported in 120 N. E. 48.

VANDALIA COAL COMPANY v. BUTLER.

[No. 9,472. Filed March 19, 1918. Rehearing denied June 28, 1918.]

1. MASTER AND SERVANT.—*Injuries to Servant.*—*Action.*—*Complaint.*—*Sufficiency.*—In an action against the master by a servant for personal injuries, the complaint, drawn under the Employers' Liability Act, Acts 1911 p. 145, §8020a *et seq.* Burns 1914, and predicated the action on the negligence of a fellow servant in starting a mine car, crushing plaintiff's hand, *held* sufficient as against demurrer. p. 251.
2. PLEADING.—*Complaint.*—*Motion to Make Specific.*—In an action for personal injuries, where the complaint stated facts sufficient to constitute a cause of action under the Employers' Liability Act, Acts 1911 p. 145, §8020a *et seq.* Burns 1914, on the theory that plaintiff was injured through the negligence of a fellow servant, the overruling of a motion made under the act of 1915, Acts 1915 p. 123, §343a Burns' Supp. 1918, to require plaintiff to state facts

to sustain allegations denominated as conclusions, which were not necessary to state a cause of action, is not reversible error. p. 252.

3. **APPEAL.—Review.—Harmless Error.—Ruling on Motion to Strike Out.**—A judgment will not be reversed because of the overruling of a motion to strike out allegations from the complaint, especially where the appellant fails to show in his brief that any evidence was submitted on such allegation and in view of the fact that the instructions limited the jury's consideration of the complaint to a theory not involving the objectionable allegations. p. 253.
4. **TRIAL.—Opening Statement to Jury.—Discretion of Court.—Reading from Complaint.**—The extent of the opening statement of a case to the jury is left largely to the discretion of the trial court and to permit the reading of the entire complaint would not ordinarily be an abuse of such discretion, although where the complaint contains matters of surplusage which might tend to prejudice the jury, the court may, on proper objection, exclude the reading of such portion, but to be available an objection thereto should be directed to the averments claimed to be prejudicial and not to the whole complaint. p. 254.
5. **APPEAL.—Review.—Evidence.—Admissibility.—Discretion of Court.**—In an action against the master by a mine worker for injuries sustained when his hand was crushed under a mine car, it was within the discretion of the trial court, and, in the absence of proof of an abuse thereof, not reversible error to permit plaintiff's witnesses to testify as to the customs and rules of the master's mine, including conversations with, and directions of, the mine boss and boss driver, and to detail incidents by which they became acquainted with such customs and rules, notwithstanding the existence thereof was admitted by the master. p. 256.
6. **APPEAL.—Review.—Harmless Error.—Admission of Evidence.**—In an action for personal injuries sustained in a mine accident, the admission of certain evidence to prove a custom or rule in the master's mine, even though erroneous, was harmless, where such rule was established not only by competent evidence, but was expressly admitted by the master. p. 256.
7. **APPEAL.—Review.—Harmless Error.—Admission of Evidence.—Cure by Instruction.**—In a servant's action for personal injuries, error, if any, in the admission of evidence as to the expectancy of life of the plaintiff, a boy fourteen years of age, and the amount of his earnings per day, was cured by an instruction that, in assessing damages, his ability to earn money and a livelihood after, but not before, he reached the age of twenty-one years, should be considered. p. 257.

Vandallia Coal Co. v. Butler—68 Ind. App. 245.

8. **APPEAL.—Waiver of Error.**—Briefs.—Grounds for a new trial are waived where appellant fails to direct a point thereto in its brief. p. 257.
9. **APPEAL.—Review.—Exclusion of Evidence.—Sustaining Objections.—Failure to State Grounds of Objection.**—That the trial court sustained objections to the admission of evidence without any grounds for the objections being given does not render the rulings erroneous, since, where evidence is excluded it is not necessary that the grounds of objection should appear, as it is immaterial whether any objection was advanced at the time of the ruling. p. 258.
10. **WITNESSES.—Cross-Examination.—Scope.—Discretion of Court.**—The extent to which a cross-examination of a witness may be carried rests within the sound discretion of the trial court and a cause will only be reversed for an abuse of such discretion. p. 258.
11. **APPEAL.—Presenting Questions for Review.—Exclusion of Evidence.**—In order to present error on the refusal of the trial court to admit certain evidence on direct examination, appellant should have made offers to prove at the time the objections were sustained and such fact must be shown by appellant in its brief. p. 259.
12. **APPEAL.—Review.—Argument to Jury.—Reading From Transcript of Evidence.**—It was not error to permit counsel reading to the jury in the course of his argument what he claimed to be a transcript of a part of the evidence furnished by the official reporter, especially where the court instructed the jury not to consider as evidence what was read from such transcript, but to rely solely upon their memory. p. 259.
13. **APPEAL.—Briefs.—Sufficiency.—Abstract Propositions of Law.**—The statement of a number of abstract propositions of law under the head "Instructions" in appellant's statement of propositions and points is not sufficient to present any question with reference to the trial court's ruling on instructions, since the brief fails to comply with Rule 22, cl. 5, of the rules of the Supreme and Appellate Courts, governing the preparation of briefs. p. 260.
14. **APPEAL.—Presenting Questions for Review.—Briefs.—Points and Authorities.**—Under Rule 22, cl. 5, of the Supreme and Appellate Courts, providing that no alleged error or point not contained in the statement of points shall be raised afterwards, either by reply brief or in oral or printed argument, where appellant, in attempting to present rulings on instructions for review, fails to comply with such rule in the preparation of its briefs by not presenting the alleged error in its statement of points, it cannot afterward present such questions by way of argument. p. 261.

15. **MASTER AND SERVANT.—Injuries to Servant.—Action.—Instructions.—Violation of Penal Statutes.**—In a servant's action against the master, a mine operator, for personal injuries, defendant's requested instruction that, if at the time of the injury plaintiff was under the age of fourteen years, he was working in defendant's mine in violation of a penal statute and could not recover, was properly refused, since the fact that a person violating a penal statute when he receives an injury caused by the negligence of another will bar a recovery only when the unlawful act is a contributory cause, and not when it is merely a condition or attendant circumstance, p. 261.

From Daviess Circuit Court; *James W. Ogdon*, Judge.

Action by Jonas Butler, by his next friend, Charles E. Butler, against the Vandalia Coal Company. From a judgment for plaintiff, the defendant appeals. *Affirmed*.

Alvin Padgett and *Henry W. Moore*, for appellant.
J. F. Weisman, *W. R. Gardiner*, *C. K. Tharp* and *C. G. Gardiner*, for appellee.

BATMAN, P. J.—This is an action by appellee against appellant to recover damages on account of injuries alleged to have been sustained by him while in the employ of appellant in its coal mine. The complaint on which the cause was tried is drawn under what is known as the Employers' Liability Act of 1911. Acts 1911 p. 145, §8020a *et seq.* Burns 1914. The first paragraph alleges, among other things, in substance, that on November 20, 1913, appellee and his father, who appears in this action as his next friend, were in the employ of appellant as loaders in a certain room of its coal mine; that on said date one Elmo Allen was in the employ of appellant as a driver to haul empty cars into said room and loaded cars out of said room by the use of a mule; that

such cars were operated over a track constructed on a descending grade from the face of the coal, where such cars were loaded, to the entry; that by reason of such fact it was necessary to chock such cars so as to keep them in place while being loaded; that strips of wood placed on such track under the front wheels of such cars were used for such purpose; that in taking such cars from said room it was necessary to remove such chocks; that it was a custom and rule in the mine that, when a driver was ready to pull a car so chocked from a room in which it was loaded, the loaders should assist the driver in removing such chocks; that in so doing one loader would remove the chock from the wheel on one side of the car and another loader would remove the chock from the wheel on the other side of the same; that in removing such chocks it was the duty of the driver to give directions when the same should be removed, and it was the duty of such loaders to obey and conform to such directions; that on said date the said Elmo Allen, as such driver, hitched a mule to a loaded car to remove it from the room in which appellee and his father were working as loaders; that each of such loaders took their places at the front end of such car to remove the chocks under the wheels thereof when ordered so to do by such driver; that the driver thereupon directed said loaders to remove the chocks, and, about the same time, negligently caused said mule to suddenly start the car; that appellee, on receiving such directions, attempted to obey the same by removing one of the chocks, and while so doing his left hand was caught and crushed between the wheel, chock and rail before he could remove the same; that such injury was caused solely by the negligence of

appellant, through the driver, as its agent, servant and employe, while appellee, without fault on his part, was conforming to an order he was under obligation to obey, by the directions of appellant, to his damage in the sum of \$15,000.

The second paragraph of the complaint alleges, among other things, substantially the same facts as the first paragraph thereof, except that it does not allege that appellee received the injuries for which he sues by reason of obeying and conforming to any order or direction given by appellant or by any of its agents or employes. It alleges that he received such injuries by reason of the facts that said driver carelessly and negligently started the mule to haul the car of coal at the time appellee stooped and got ready to remove the chock from under the wheel of said car and thereby caused said mule to pull said car over said chock and appellee's hand while he was in the act of removing said chock and before he had time so to do. It also contains certain allegations with reference to the tools, implements, and appliances furnished by appellant to appellee for the purpose of the performance of such work, being dangerous, defective, insufficient, and extrahazardous. Appellant filed a demurrer to each paragraph of the complaint, which was overruled. It also filed a motion to require appellee to state facts necessary to sustain certain alleged conclusions set out in said second paragraph of the complaint, which was also overruled. It also filed a further motion asking the court to strike out and reject certain specified parts of each paragraph of the complaint, which was overruled. Appellant then filed an answer in general denial, and the cause was submitted to a jury for trial on the issues thus formed. A verdict was re-

turned in favor of appellee for \$3,000 and judgment was rendered accordingly. Appellant filed a motion for a new trial, which was overruled. It now prosecutes this appeal, and has assigned appropriate errors, challenging the action of the court in the several rulings indicated, to which proper exceptions had been reserved.

Appellant contends that the court erred in overruling its demurrer to each paragraph of the complaint, as neither of such paragraphs state facts sufficient to constitute a cause of action against

1. it. It states its objections as follows: (1) The first paragraph shows on its face that the alleged order was in no sense an order, but was purely and only a signal from the driver to the loaders informing them that he was ready to do the spragging; (2) neither paragraph alleges that, in responding to the signal, it was necessary for appellee or his father to place their hands, or either of them, under the car wheel, or that they were required or expected to do anything which required time; (3) neither paragraph alleges that reasonable time was not given and allowed; (4) the second paragraph alleges that the chocks were removed at a signal from the driver "as said driver would cause the mule to start said car," leaving the only reasonable inference to be that the pulling of the chocks and the starting of the mule was to take place at the same time. We have examined the complaint, in the light of these objections, and find that each paragraph contains allegations of facts, either directly stated, or fairly and reasonably implied, sufficient to constitute a cause of action on the theory adopted by the court on the trial of the cause. Under the rules for construing a complaint

as stated in the well-considered case of *Domestic Block Coal Co. v. DeArmey* (1913), 179 Ind. 592, 100 N. E. 675, 102 N. E. 99, we hold there was no error in overruling appellant's demurrer.

The second paragraph of the complaint contains a number of allegations with reference to the places, ways, means, methods, management, tools, im-
2. plements, equipment, appliances, etc., being defective, dangerous, insufficient, and hazardous, and as to knowledge thereof by appellant, its agents, servants, employes and officers, long before the happening of the grievances complained of, and charges carelessness and negligence in adopting, furnishing and using the same, etc. In the formation of the issues, appellant claimed that such statements were conclusions, and filed a motion under an act approved March 5, 1915 (Acts 1915 p. 123, §343a Burns' Supp. 1918), to require appellee to state facts necessary to sustain the same. This motion was overruled and appellant predicates error on such ruling. The motion is long, and no good purpose could be served by setting it out in full, as we have sufficiently indicated the character of the alleged conclusions for the purpose of a determination of the question raised. The motion itself is not strictly formal, as it fails to set out wherein such paragraph is insufficient as required by such act. By waiving such informality, and considering the motion on its merits, we are unable to agree that the court committed reversible error in overruling the same. It was held under a former act, of which the act of 1915 is an amendment, that it is only those conclusions which are necessary to the sufficiency of the pleading that are affected thereby. *Premier Motor Mfg. Co. v. Tulford* (1916),

/

61 Ind. App. 164, 111 N. E. 645; *S. W. Little Coal Co. v. O'Brien* (1916), 63 Ind. App. 504, 113 N. E. 465, 114 N. E. 96; *Indiana Mfg. Co. v. Coughlin, Admr.* (1917), 65 Ind. App. 268, 115 N. E. 260. The act as amended is not changed in this regard, and hence such decisions are still controlling. The paragraph of complaint to which such motion was addressed was drawn under the Employer's Liability Act of 1911, *supra*, and proceeded on the theory that appellee received his alleged injuries by reason of the negligence of a fellow servant in the employ of appellant, as determined by the trial court. It contains facts sufficient to constitute a cause of action on such theory, independent of any matters properly denominated as conclusions in such motion. There was therefore no available error in overruling such motion.

Appellant also filed its motion to strike out and reject certain parts of each the first and second paragraphs of the complaint, and assigned reasons

3. therefor. The parts sought to be stricken out of the first paragraph of the complaint relate to certain alleged instructions given by appellant to its drivers and loaders with reference to moving loaded cars from its mine and with reference to the duty of appellee, as a loader, to obey the orders of the driver in removing the chocks, on the occasion he received his alleged injuries. Such allegations were allegations of facts, clearly pertinent to the theory on which such paragraph is drawn, and the court did not err in refusing to strike out the same. The parts of the second paragraph of complaint which appellant sought to have stricken out were mainly the same matters alleged in his former motion

to be conclusions and were of the nature indicated, *supra*. They are not set out in full because of their length, and a restatement of the same is unnecessary here. It has been held that a judgment will not be reversed on account of the overruling of a motion to strike out. *Ohio Valley Trust Co. v. Wernke* (1912), 179 Ind. 49, 99 N. E. 734. Moreover, appellant has failed to show in his brief that there was any evidence submitted to the jury on the allegations which it sought to have stricken from said second paragraph of complaint. We may therefore indulge the presumption that there was none, since the burden rests on appellant to show error. Taking this fact in connection with the further fact that the court by an instruction given at the request of appellant, in effect, limited the consideration of the jury, as to such paragraph, to a theory which in no way involved such alleged objectionable allegations, it is clear that the overruling of such motion, if error, was harmless. *Portland, etc., Mach. Co. v. Gibson* (1916), 184 Ind. 342, 111 N. E. 184.

Appellant contends that the court erred in permitting appellee's counsel, in his opening statement, to read to the jury the second paragraph of the 4. complaint, over its objection. The statute governing trials by jury provides that, when the jury has been sworn, the party upon whom rests the burden of the issues may briefly state his case, and the evidence by which he expects to sustain it. §558 Burns 1914, §533 R. S. 1881. The Supreme Court has held that the extent of such statement is left much to the discretion of the trial court. *Aylesworth v. Brown* (1869), 31 Ind. 270; *United States Fidelity, etc., Co. v. Poetker* (1913), 180 Ind. 255, 102 N. E. 372, L. R. A.

1917B 984. It is evident that, as a general rule, the action of the court in permitting a reading of the entire complaint to the jury would not be an abuse of such discretion. If, perchance, any portion of a complaint, or any paragraph thereof, contains matters of surplusage which is of such a nature that it might reasonably tend to prejudice the jury in the trial of the cause, the court on a proper objection, in the exercise of its discretion, might exclude the reading of such portion in the opening statement without committing error. The record in this case discloses that appellant's objection to the reading of the complaint in appellee's opening statement was not limited to any specific portion of the same, but was addressed to the reading of the complaint as an entirety, without offering any reason for such objection. In its brief it does not claim that the first paragraph contains anything not proper to have been read to the jury in such statement. As to the second paragraph, it confines its objection to the matter indicated, *supra*, which in making the issues it had claimed were conclusions and had sought first to have sustained by allegations of facts and later to have stricken out. It is not contended in this court that the reading of the remaining portion of such second paragraph was error. It thus appears that appellant's objection in regard to such opening statement was too broad to be available, even if it could be said that any specific portion of such second paragraph should have been excluded on a proper objection. *Southern R. Co. v. Adams* (1913), 52 Ind. App. 322, 100 N. E. 773. However, we may add that had such objection been limited to the reading in such opening statement of that portion of such second

paragraph on which it now predicates error, the overruling of such objection would not have been reversible error, for the reasons stated *supra* in passing on the action of the court in refusing to strike out such allegations in the formation of the issues.

Appellant complains of the admission of certain detailed evidence, relating to the custom and rule of the mine, that the loaders should help the

5. drivers under certain conditions, including certain conversations with and directions of the mine boss and boss driver. It contends that such custom and rule could have been so stated by the witnesses in the first instance, without detailing the incidents by which they became possessed of a knowledge of such fact, and cites the case of *Conner v. Citizens' St. R. Co.* (1896), 146 Ind. 430, 45 N. E. 662, in support thereof. But, conceding this to be true, it does not follow that the court erred in permitting the witnesses to detail such incidents, notwithstanding appellant admitted the existence of such custom and rule on the trial of the cause. The admission of such evidence under the circumstances was within the sound discretion of the court, and, in the absence of a showing of an abuse thereof, its admission does not constitute reversible error.

Complaint is also made of the ruling of the court in permitting the witness Dave Fulkerson to state what Fred Brooks, a boss driver of appellant,

6. had said to him after the accident with reference to getting the assistance of the loaders in helping with the cars. It is apparent that such evidence was introduced as tending to establish a custom or rule in appellant's mine. It is claimed that such ruling is error, as it relates to a transaction

occurring after the injury to appellee on which this action is based. It may be conceded that the admission of such evidence, unless related to the time of the accident under consideration by other evidence, was erroneous, as a subsequent custom or rule of itself was immaterial. However, the admission of improper evidence is not reversible error if harmless. *Louisville, etc., R. Co. v. Miller* (1895), 141 Ind. 533, 37 N. E. 343; *Ohio Valley Trust Co. v. Wernke, supra*; *Domestic Block Coal Co. v. DeArmey, supra*. The evidence in question comes within the rule stated, as the existence of such custom and rule was not only proved by competent evidence, but was expressly admitted by appellant on the trial.

Appellant predicates error on the action of the court in admitting in evidence that the expectancy of a boy fourteen years of age is 46.06 years, and

7. also in admitting evidence as to what appellee's earnings were per day, while working in the room where he received his alleged injuries.
8. It will be noted that such evidence was directed solely to the question of damages. Appellant assigned as one of the causes for a new trial that the damages assessed by the jury are excessive, but it has waived such assignment by failing to direct a point to it in its brief. Under such circumstances any error in the admission of such evidence is not available. *Sovereign Camp, etc. v. Latham* (1915), 59 Ind. App. 290, 107 N. E. 749; *Chicago, etc., R. Co. v. Brown* (1917), 66 Ind. App. 126, 115 N. E. 368; *Chicago, etc., R. Co. v. Prohl* (1917), 64 Ind. App. 302, 115 N. E.

962. Moreover, the record discloses that the

7. jury was told by the court, in instruction No. 12, given on its own motion, in effect, that if it

found for appellee it would be proper, in fixing his damages, to consider his ability to earn money and a livelihood after he arrived at the age of twenty-one years, but that it would not be authorized to assess any damages in appellee's favor on account of anything he might have been able to earn before he arrived at the age of twenty-one years. For this further reason no reversible error was committed in the admission of such evidence.

Appellant in its motion for a new trial gives among its reasons therefor that the court erred in sustaining objections to certain questions which it asked

9. appellee's witnesses on cross-examination, and also erred in sustaining objections to certain questions which it asked its own witnesses on direct examination. The sole ground on which such alleged errors are based, as appears from appellant's propositions and points, is that the court sustained said several objections without any reasons being given therefor. Such fact did not render the rulings erroneous. It has been held that where evidence is excluded, it is not necessary that the ground of objection should appear, as it is immaterial whether any objection was advanced at the time of the ruling. *Abshire v. Williams* (1881), 76 Ind. 97; *Haas v. Cones Mfg. Co.* (1900), 25 Ind. App. 469, 58 N. E. 499; *Eckman v. Funderburg* (1914), 183 Ind. 208, 108 N. E. 577. Appellant further states in its proposition and points, with reference to the exclusion of evi-

10. dence on cross-examination, that the questions asked were well within the scope of the direct examination. It is well settled that the cross-examination of a witness, and the extent to which it may be carried, rests in the sound discretion of the trial court,

and only an abuse of this discretion is a cause for reversal on appeal. *Shields v. State* (1897), 149 Ind. 395, 49 N. E. 351; *Smith v. State* (1905), 165 Ind. 180, 74 N. E. 983; *Eacock v. State* (1907), 169 Ind. 488, 82 N. E. 1039. While a portion of such cross-examination may have been admissible, it was not of such a character that we can say that its exclusion was an abuse of discretion, and hence there is no available error in that regard. As to so much of such

11. alleged error as relates to the exclusion of evidence on direct examination, we note that appellant does not show in his brief that any offers to prove were made at the time of such rulings. Such offers to prove were necessary in order to present any questions on appeal with reference to the action of the court in concluding such evidence. *Cohen v. Reichman* (1913), 55 Ind. App. 164, 102 N. E. 284; *Williams v. Chapman* (1902), 160 Ind. 130, 66 N. E. 460. It is also necessary that such fact be shown by appellant in his brief, in order to have such questions considered by this court. *Hitz v. Warner* (1911), 47 Ind. App. 612, 93 N. E. 1005; *Harmon v. Pohle* (1910), 46 Ind. App. 369, 92 N. E. 119. Such omission leaves nothing for our determination in that regard.

Appellant contends that the court erred in permitting one of the attorneys for appellee to read to the jury in the course of his argument what he

12. claimed was a transcript of a part of the evidence furnished him by the official reporter. The record shows that appellant objected to such reading, and the court overruled such objection, but it is not shown, except inferentially, that any portion of such transcript was in fact read to the jury. But, if we assume that it was so read, we cannot say that

the court erred in overruling appellant's objection thereto. It has been held that to permit counsel in his argument to read from a paper which he claims contains a copy of certain testimony furnished to him by the official stenographer was within the sound discretionary power of the trial court. *Chicago, etc., R. Co. v. Gorman* (1915), 58 Ind. App. 381, 106 N. E. 897. It has also been held that to permit an attorney in argument to read to the jury what he claimed to be an extract from the evidence made by the stenographer from her shorthand notes was not error. *Reed v. State* (1897), 147 Ind. 41, 46 N. E. 135. Moreover, the record discloses that the court instructed the jury as follows: "The jury is instructed now that they cannot take as evidence in the case, what has been read from the paper from the stenographer, but that they must rely solely upon their memory, as to what the evidence in the case was, as it came from the witness stand." This action of the court left appellant without ground for complaint, even if it could be said that the reading of such paper was in any sense improper. *Southern R. Co. v. Adams, supra*; *Ohio Valley Trust Co. v. Wernke, supra*; *Cleveland, etc., R. Co. v. Simpson* (1915), 182 Ind. 693, 104 N. E. 301, 108 N. E. 9; *Louisville, etc., R. Co. v. Montgomery* (1917), 186 Ind. 384, 115 N. E. 673.

Appellant in its motion for a new trial alleges that the court erred in giving certain instructions, and in refusing to give certain instructions tendered

13. by it, but has failed to present any question thereon for the determination of this court, as required by clause 5 of Rule 22, governing the preparation of briefs, except as to the error of the court in refusing to give instruction No. 22, tendered by it.

Vandalia Coal Co. v. Butler—68 Ind. App. 245.

A number of abstract propositions of law are stated under the heading "Instructions" in appellant's statement of propositions and points, but this is not sufficient to present any question with reference to the instructions given, or tendered and refused, as has been repeatedly held by both courts of appeal in this state. *Mutual Life Ins. Co. v. Finkelstein* (1915), 58 Ind. App. 27, 107 N. E. 557; *German Fire Ins. Co. v. Zonker* (1915), 57 Ind. App. 696, 108 N. E. 160; *New v. Jackson* (1912), 50 Ind. App. 120, 95 N. E. 328; *Knapp v. State* (1907), 168 Ind. 153, 79 N. E. 1076, 11 Ann. Cas. 604; *Schondel v. State* (1910), 174 Ind. 734, 93 N. E. 67; *Chicago, etc., R. Co. v. Biddinger* (1916), 63 Ind. App. 30, 113 N. E. 1027; *Indiana Mfg. Co. v. Coughlin* (1917), 65 Ind. App. 268, 115 N. E. 260; *Miller v. Haney* (1917), 64 Ind. App. 406, 116 N. E. 21; *Moore v. Ohl* (1917), 65 Ind. App. 691, 116 N. E. 9.

We note that appellant has undertaken to present certain questions relating to the instructions given and refused by way of argument, but this will

14. not suffice, as it has been repeatedly held that no error not properly presented as required by said Rule 22 can be raised afterwards in the brief or reply brief, or in oral or printed argument, or in a petition for rehearing, but will be considered waived. *Pittsburgh, etc., R. Co. v. Lightheiser* (1907), 168 Ind. 438, 78 N. E. 1033; *Kelley v. Bell* (1909), 172 Ind. 590, 88 N. E. 58; *Wellington v. Reynolds* (1912), 177 Ind. 49, 97 N. E. 155; *Michael v. State* (1912), 178 Ind. 676, 99 N. E. 788; *Wolf v. Akin* (1914), 55 Ind. App. 589, 104 N. E. 308; *Moore v. Ohl, supra*.

Instruction No. 22 tendered by appellant and refused by the court is as follows: "The court now

instructs you that if you should find from the 15. evidence that the plaintiff, Jonas N. Butler, was at the time when he received the injury complained of working in defendant's mine and that he was at said time a person under the age of fourteen years, then the said Jonas N. Butler was working in violation of a penal statute of the State of Indiana; was engaged in an unlawful act; and cannot recover in this cause of action and your verdict should be for the defendant." We cannot agree that the court erred in refusing to give this instruction. It is well settled that the mere fact that a person is violating a penal statute when he receives an injury caused by the negligence of another will not of itself bar a recovery. Whether such fact will have such effect depends on the relation between such violation and such injury. If such unlawful act was a contributing cause of such injury, then it will bar a recovery, but if it is merely a condition, or attendant circumstance, it will not have such effect. As the instruction in question violates this rule, it was therefore properly refused. *Dudley v. Northhampton St. R. Co.* (1909), 202 Mass. 443, 89 N. E. 25, 23 L. R. A. (N. S.) 561; *Moran v. Dickinson* (1910), 204 Mass. 559, 90 N. E. 1150, 48 L. R. A. (N. S.) 675; *Ensley, etc., Co. v. Otwell* (1912), 142 Ala. 575, 38 South. 839, 4 Ann. Cas. 512; *Henning v. New Haven* (1910), 82 Conn. 661, 74 Atl. 892, 25 L. R. A. (N. S.) 734, 18 Ann. Cas. 240; *Hughes v. Atlanta Steel Co.* (1911), 136 Ga. 511, 71 S. E. 728, 36 L. R. A. (N. S.) 547, Ann. Cas. 1912C 394. This rule renders it unnecessary for us to consider the further question as to whether appellee was in fact violating a penal statute if working in a mine in this state while under the age of fourteen years. Suffice it to say that the statute in question

Board, etc. *v.* Riggs—68 Ind. App. 263.

was evidently enacted primarily for the welfare of the state in an exercise of its police power, and a mine operator cannot use it as a shield to protect himself from liability for negligence resulting in injury. *Inland Steel Co. v. Yedinak* (1909), 172 Ind. 423, 87 N. E. 229, 139 Am. St. 389.

Certain other alleged errors are stated in the motion for a new trial which we have not considered, as they are not presented in appellant's brief.

We conclude that the court did not err in overruling such motion, and that there is no available error in the record. Judgment affirmed.

NOTE.—Reported in 119 N. E. 34. Master and servant: whether the fact that a miner was working in violation of statute forbidding his employment prevents a recovery by him for personal injuries, 48 L. R. A. (N. S.) 675. See under (1) 26 Cyc 1384; (4) 38 Cyc 1472, 1482; (12) 38 yc 1483, 1502; (15) 26 Cyc 1091.

BOARD OF COMMISSIONERS OF THE COUNTY OF SULLIVAN *v.* RIGGS.

[No. 9,303. Filed October 2, 1917. Rehearing denied December 4, 1917. Transfer denied June 28, 1918.]

1. PLEADING. — *Demurrer. — Memorandum. — Statute.—Scope. —* Where an action was commenced prior to the act of 1911, Acts 1911 p. 415, §344 Burns 1914, requiring a memorandum to be filed with a demurrer for insufficiency of facts, but excepting pending litigation, and was reversed on appeal and remanded to the court below subsequently to the enactment of such statute, the plaintiff's demurrers to paragraphs of answer came within the exception contained in the act and it was not necessary that they be accompanied by memoranda even though the original pleadings were amended and additional pleadings filed, where such pleadings did not in any manner change the nature and character of the original action. p. 266.
2. APPEAL.—*Review.—Rulings on Demurrers.—Scope of Review.—* The ruling of the trial court sustaining demurrers to paragraphs

of answer for want of facts will be sustained on appeal if the answers are insufficient for any reason. p. 267.

3. **APPEAL.—Review.—Rulings on Demurrers.—When Reversible Error.**—Where plaintiff sold the minerals under his land, but the auditor refused to reduce the valuation thereof for taxation, in an action to recover excess taxes paid, paragraphs of answers alleging that the original valuation was the true cash value of the land, exclusive of coal or other minerals, presented a good defense not provable under defendant's general denial, and the sustaining of demurrers to the answers was reversible error. p. 267.

From Clay Circuit Court; *John M. Rawley*, Judge.

Action by James R. Riggs against the board of commissioners of the county of Sullivan, on a claim rejected by the board. From a judgment for plaintiff the defendant appeals. *Reversed*

Charles D. Hunt and *Gilbert W. Gambill*, for appellant.

Harris & Bedwell, *William T. Douthitt*, *John W. Lindley* and *M. A. Haddon*, for appellee.

IBACH, P. J.—This case has heretofore received the consideration of this and the Supreme Court. *Riggs v. Board, etc.* (1914), 181 Ind. 172, 103 N. E. 1075. After the reversal the case was returned to the Sullivan Circuit Court, where appellee filed an amended complaint which is not materially different from the original complaint. To this amended complaint appellant filed an answer in general denial, also two affirmative answers, after which appellee filed a fourth paragraph of complaint, to which appellant filed an answer of three paragraphs, and afterwards a fourth and fifth paragraph of answer to the amended and the additional fourth paragraph of complaint.

Appellee's demurrer for want of facts to each and all of such affirmative answers was sustained, to which rulings appellant at the time excepted, and,

refusing to plead further, judgment was rendered for appellee.

Appellant has appealed to this court and assigned as errors the action of the trial court in sustaining appellee's demurrers to each of the affirmative answers.

It is shown by the several paragraphs of complaint that in 1903 appellee was the owner of certain described lands in Sullivan county, Indiana, which in that year were given by the proper taxing officers a taxable valuation of \$10,165. In February, 1904, he sold the coal, fire clay and minerals under the surface of such lands for \$3,360. These latter properties were by the county auditor placed upon the tax duplicate in the name of such grantees, and were taxed at the same valuation as the consideration paid therefor, and such taxes for the years 1904, 1905 and 1906 were paid by such grantees. The auditor, however, failed to reduce the original assessment against appellee's lands, but required him to pay taxes on the original assessment of \$10,165. After such sale the amount of taxes paid by the grantees of the coal and minerals was \$129, and to that extent the taxes were wrongfully assessed against him, and it is this amount which he seeks to recover.

It is appellee's theory manifest from the leading averments of his several paragraphs of complaint that the county auditor should have deducted the taxable valuation of the coal and minerals sold by him in 1904 from the original taxable valuation placed upon his farm, and by reason of his failure so to do appellee was wrongfully required to pay taxes on such original valuation for the years 1904, 1905 and 1906, although the taxes levied on such coal and minerals were paid by the purchasers thereof, conse-

quently he was entitled to recover that amount from the county.

The several answers in substance allege that the original taxable valuation placed upon appellee's lands at \$10,165 was the fair and true cash value thereof exclusive of any coal or other minerals, and in making such original assessment the assessor did not take into consideration any coal or other minerals under the real estate, but the same were omitted by him when the land was originally assessed. Also the original assessed valuation of appellee's lands was similar to the assessment made against the surface of adjacent real estate in the vicinity of appellee's land of the same character, and the minerals which had been severed in adjacent lands were assessed separate to other parties than the owners of the surface, and the value of the surface of adjacent lands was valued at the same rate as appellee's land at which time there had been no severance of the coal and minerals from appellee's real estate.

It is first insisted that there was error in sustaining the demurrers to the several paragraphs of answers because no memoranda accompanied the de-

1. murrers. The record does not support this contention. This action was commenced prior to 1911, and the act upon which appellant relies, which requires a memorandum to be filed with the demurrer specifically excepts pending litigation. Acts 1911 p. 415, §344 Burns 1914; *Bissell Chilled Plow Works v. South Bend Mfg. Co.* (1917), 64 Ind. App. 1, 111 N. E. 932. It is true some amendments to the original pleadings were made after the case was remanded to the Sullivan Circuit Court, and additional pleadings were filed, but these did not in any manner change the nature and character of such original ac-

tion. They did not make a new cause of action. *Terre Haute, etc., R. Co. v. Zehner* (1906), 166 Ind. 149, 76 N. E. 169, 3 L. R. A. (N. S.) 277, and cases cited.

In any event the court sustained the several demurrers, and the presumptions in favor of the rulings of the trial court require us to sustain the rulings

2. if we find the answers insufficient for any reason. *Bruns v. Cope* (1914), 182 Ind. 289, 105 N. E. 471; *Barnum v. Rallihan* (1916), 63 Ind. App. 349, 112 N. E. 561.

Appellee contends that all issuable facts presented by the affirmative paragraphs of answer were provable under the general denial, and therefore

3 any error in sustaining the demurrers to such answers was harmless. These answers were in the nature of a confession and avoidance, and presented traversable facts not admissible under the general denial to negative proof in denial of the facts stated in the complaint, or to show facts which were inconsistent with the facts alleged in the complaint and which tended to meet and break down or defeat the appellee's cause of action.

It was held in the former appeal that whether or not under the allegations of the pleadings then under consideration the original assessment of the land in 1903 included the minerals—that is, as to whether or not they were included in the assessment—is a traversable fact. It seems to us that we cannot escape the full force of this holding. The court has said that whether the coal and minerals under appellee's land were assessed for taxation by the assessor was a traversable fact. If so, appellant's answers were good, and under them they would have the right to produce all competent parol testimony or other testimony in possession of appellant to show all the facts

pertaining to the original assessment of appellee's land, and that in the assessment thereof the coal and minerals were not assessed.

These several answers seem to have been drawn to meet the several holdings contained in the former opinion bearing on this branch of the case. It was error on the part of the trial court to sustain the demurrers to such answers, thereby preventing appellant from presenting the issues thus tendered.

Appellee further contends that as the coal and minerals were not severed from the land when the assessment was made in 1903, that such coal and minerals were assessed with the land, and that the addition of any new valuation upon the theory, either of undervaluation in 1903, or as omitted property, is unwarranted, and therefore the answers are insufficient for that reason.

This contention must, we think, be determined separately and distinctively from any defense available to appellee had he still retained the land and the coal, etc., in their unsevered condition as they were in 1903 when the quadrennial assessment of the land was made.

"When an auditor transfers a portion of a tract of land *against which a valuation for taxation has been made*, he must diminish the valuation of the whole by the amount of the valuation which he fixes on the part transferred." (Our italics.) *Riggs v. Board, etc., supra*.

The very contention here is that no valuation was placed upon the coal and minerals underlying the land of appellee in the assessment of 1903. If this is true as a matter of fact we see nothing to hinder the auditor under the authority provided in §10310

Baltimore, etc., R. Co. v. Peck—68 Ind. App. 269.

Burns 1914, Acts 1897 p. 141, from correcting the tax duplicate and adding such property thereto with the proper valuation, and charging such property and the owner thereof with the proper amount of taxes thereon.

The coal underlying this land, after its severance, became property capable of definite ascertainment for the purposes of valuation for taxation, and was properly added as omitted property; but, whether properly added or not by reason of any irregularity, appellee cannot complain, as any irregularity was a matter between the taxing power and the new owner of the minerals.

The court erred in sustaining the demurrers to the several answers filed by appellant. Judgment reversed, with instructions to overrule each of said demurrers, and for further proceedings consistent with this opinion.

NOTE.—Reported in 117 N. E. 214.

BALTIMORE AND OHIO RAILROAD COMPANY v. PECK.

[No. 9,135. Filed December 22, 1916. Rehearing denied December 19, 1917. Transfer denied June 28, 1918.]

1. RAILROADS.—*Damage to Property.—Fire.—Proof.—Circumstantial Evidence.*—The fact that a fire which burned over plaintiff's land originated on defendant's right of way need not be established by direct testimony, but may be proved by circumstantial evidence. p. 272.
2. RAILROADS.—*Damage to Property.—Fire.—Liability.—Anticipating Negligence.*—The owner of land near a railroad has the right to assume that it will perform all legal duties resting upon it, and such owner is not bound to anticipate that the railroad will be derelict in its duty to prevent the spread of a fire originating on its right of way. p. 274.

Baltimore, etc., R. Co. v. Peck—68 Ind. App. 269.

3. **RAILROADS.—Damage to Property.—Fire.—Liability.—Negligence.**—The owner of land near a railroad right of way assumes the risk of accidental loss by fire not occasioned through the railroad's negligence or wilfulness, but does not assume any risk occasioned by negligence of the railroad. p. 274.
4. **RAILROADS.—Damage to Property.—Fire.—Liability.—Contributory Negligence.—Knowledge of Danger.**—Where a person knows that his property is in danger of destruction by fire caused by the negligence of another and fails to use every reasonable effort to protect it from impending danger, he is guilty of contributory negligence. p. 274.
5. **RAILROADS.—Damage to Property.—Fire.—Contributory Negligence.—Knowledge of Danger.**—The fact that the owner of a farm did not live thereon and that it was not occupied by a tenant does not establish that the owner was without knowledge that his property was in danger of being injured by fire, but may be considered by the jury on the issue of contributory negligence. p. 274.
6. **RAILROADS.—Damage to Property.—Fire.—Liability.—Degree of Care Required.**—In an action against a railroad company for damage to land by fire which escaped from defendant's right of way, defendant was only called upon to prove that it used that degree of care that an ordinarily prudent man would have used under the circumstances. p. 275.
7. **RAILROADS.—Damage to Property.—Fire.—Question for Jury.—Contributory Negligence.**—In an action against a railroad for damage to land by fire, where it appeared from the evidence that because of the peaty condition of the soil, the drought, and the growth of grass and weeds, which were withered and dry, the owners of lands between the railroad's right of way, where the fire originated, were unable to control the spread of the fire onto and across their lands to plaintiff's farm, the question whether plaintiff could have saved his property by the exercise of ordinary care was for the jury. p. 275.
8. **RAILROADS.—Damage to Property.—Fire.—Contributory Negligence.**—The owner of property destroyed by fire is not guilty of contributory negligence for failing to make any attempt to save his property, where any effort he could have made would have been ineffectual. p. 276.
9. **RAILROADS.—Damage to Property.—Fire.—Liability.—Harmless Error.—Instructions.**—In an action against a railroad company for damage by fire originating on its right of way, an instruction that a railroad company may be free from negligence in allowing combustible material to accumulate upon its right of way and permitting it to be burned thereon, and that whether it was negligent in allowing the fire to escape from its right of way, although

Baltimore, etc., R. Co. v. Peck—68 Ind. App. 269.

subject to the criticism that, when standing alone, the jury might infer that proof establishing the accumulation of combustible material on the right of way, or the burning of it thereon, would make out a cause of action against defendant, the error in giving such instruction was not prejudicial to defendant in view of subsequent instructions that, if the railroad permitted combustible material to accumulate and be burned on the right of way, it would have to use ordinary care to prevent the fire from escaping and injuring other lands; that, if the evidence failed to show that the fire escaped through the negligence of the railroad, it was not liable; that there was no presumption that any of the material allegations of the complaint were true and that there could be no recovery unless the material allegations of the complaint were established by the evidence; that, if plaintiff failed to prove that whatever fire there was on the right of way was negligently permitted to escape, there could be no recovery. p. 276.

From Porter Superior Court; *Harry L. Crumacker*, Judge.

Action by Egbert A. Peck against the Baltimore and Ohio Railroad Company. From a judgment for plaintiff, the defendant appeals. *Affirmed*.

Bomberger, Curtis, Starr & Peters, William H. Dowdell and Calhoun, Lyford & Sheean, for appellant.

D. E. Kelly, F. B. Parks and T. C. Mullen, for appellee.

MORAN, P. J.—Appellee's real estate located in Porter county, Indiana, was injured by fire burning over the same. For such injury he recovered a judgment in damages against appellant in the sum of \$1,200. The appeal is from this judgment. This cause has reached this court on appeal for the second time. *Baltimore, etc., R. Co. v. Peck* (1913), 53 Ind. App. 281, 100 N. E. 674.

The theory of the complaint is that appellant negligently permitted large quantities of combustible material to be gathered on its right of way and set

fire to the same, and then negligently permitted the fire to escape from its right of way to lands adjoining, and finally through appellant's negligence it reached appellee's land by passing over lands lying between appellee's real estate and the real estate to which the fire first escaped.

A reversal is sought on the action of the trial court in overruling appellant's motion for a new trial. Embraced within this assignment, the sufficiency of the evidence to sustain the verdict of the jury and the correctness of certain instructions are questioned.

The attack on the verdict as to the sufficiency of the evidence to sustain the same can with propriety be subdivided as follows: First, that the evidence fails to establish the fact that the fire started on the right of way or that the injury complained of was caused by the fire alleged in the complaint to have started on the right of way on or about October 1, 1908; second, that the record is silent as to whether appellee took any action to prevent the spread of the fire so as to avoid the injury, and, in the absence of evidence to this effect, there could be no recovery, as the burden was upon appellee to show his freedom from contributory negligence in this respect.

As to the first proposition, and by way of further elucidation, the point is made that there is no evidence directly disclosing that the fire started

1. on the right of way of the railroad, and hence that there was a failure of proof. In this appellant seems to be mistaken. The record discloses that the witness Timothy Merton testified that he knew that the fire started in a pile of ties located on the right of way. Further, appellee was not bound to prove by direct evidence that the fire started on

the right of way of the railroad company. This fact was susceptible of being established by circumstantial evidence. There is evidence also to the effect that the fire on the right of way escaped to adjoining lands, and, after reaching such adjoining lands, it was fanned by the winds to the southwest; but, in following the course traveled by the fire over the intervening lands between the land of appellee and the starting point on the right of way, the fire that reached appellee's land can be accounted for in this manner. While, as to the exact time and manner in which the fire finally reached appellee's land, the evidence is not of a direct and positive character; however, when the circumstances in evidence and the surrounding conditions are taken into consideration, with the facts that stand out undisputed, the jury was warranted in finding that the fire started on appellant's right of way as alleged and from there spread to appellee's land (*Pittsburgh, etc., R. Co. v. Indiana Horseshoe Co.* [1899], 154 Ind. 322, 56 N. E. 766), which the jury must have found, as it was informed that there could be no recovery without the allegations of the complaint being established by a fair preponderance of the evidence, and that only in the event that the injury complained of was caused by fire starting upon appellant's right of way and reaching appellee's land, in the manner alleged in the complaint, could there be a recovery for appellee. Having reached the conclusion that the jury was warranted in finding that the fire alleged to have started upon the right of way and reached appellee's real estate by passing over the intervening lands in the manner alleged, there remains, so far as the evidence

is concerned, the question as to whether appellee established his freedom from contributory negligence.

Appellee had the right to assume that appellant would perform all of the legal duties resting upon it under the law to be performed, and was not

2. bound to anticipate that appellant would be derelict in its duty towards him. Appellee assumed, however, accidental loss by fire not
3. occasioned through negligence or wilfulness on the part of appellant, and appellant had the right, so far as the property of others was concerned, to operate and use the railroad, keeping within the bounds of ordinary care, and in this same connection appellee by the ordinary use of his property did not assume any risks occasioned by the negligence of appellant. *Tien v. Louisville, etc., R. Co.* (1896), 15 Ind. App. 304, 44 N. E. 45; *Wabash R. Co. v. Miller* (1897), 18 Ind. App. 549, 48 N. E. 663; *Pittsburgh, etc., R. Co. v. Indiana Horseshoe Co., supra.*

It seems to be the law that, where a person sees or knows that his property is in danger of destruction by fire caused by the negligence of another, he

4. must use every reasonable effort to protect the same from impending danger, and, if he fails to do so, he will be deemed guilty of contributory negligence. *Lake Erie, etc., R. Co. v. Keiser* (1900), 25 Ind. App. 417, 58 N. E. 505.

But the case at bar does not strictly fall within this rule as contended for by appellant, as the evidence discloses that appellee did not live on the farm at the time the injury occurred; and the farm was not occupied by a tenant, and there is nothing to show that appellee had notice that his property was endangered by the fire that was raging in the neighbor-

hood. We do not wish, however, to be understood as holding that the fact that appellee was not living upon his farm, and that the same was not occupied by a tenant, establishes the fact that he was without knowledge that his property was in danger of being injured by fire. These facts were proper for the jury to consider as to the question of contributory negligence, as appellant was only called upon to

6. prove that he exercised that degree of care that a prudent man would have exercised under the circumstances, and this the jury was informed
7. he must do in order to entitle him to recover, and which the general verdict found. Within

this scope of inquiry must be considered all of the facts and circumstances that have a bearing thereon: That appellee's farm or the part thereof first reached by the fire was a considerable distance from the right of way of appellapt's railroad; that the lands of others intervened; that owners of the real estate over which the fire spread before reaching appellee's land made a diligent effort to retard the progress of the fire, but their efforts were unavailing; that real estate over which the fire spread was covered with a vigorous growth of grass and weeds, which was withered and dry and highly inflammable, and the soil in this locality, including appellee's, over which the fire spread was for the most part of vegetable origin, or peaty, which became ignited on account of a drought that existed at the time, which rendered the fire uncontrollable, as the fire burned into the ground at places for a considerable depth. Even should it be conceded that by the exercise of ordinary care appellee could have acquired knowledge that fire was raging in the neighborhood of his land, it appears that any

attempt he could have made would have been futile. The evidence, from the peculiar nature of the conditions and surroundings, seems to establish the fact that there was nothing which appellee could have done and failed to do that was the proximate cause of the injury to his real estate.

If there was nothing that appellee could have done to save his property had he made an effort so to do, either in person or through others, as it ap-

8. pears, then his failure to make such an effort does not establish the fact that he was guilty of contributory negligence. While the question is not free from difficulty, it appears that it was within the province of the jury to have found, as they did, that appellee established his freedom from contributory negligence, and that he exercised that degree of care that a prudent man would have exercised under the circumstances. The question was one for the jury, as it resolved itself into the weight of the evidence and not the sufficiency. *United States Cement Co. v. Whitted* (1910), 46 Ind. App. 105, 90 N. E. 481.

The only instructions given to the jury were on the court's own motion, and after instructing the jury as to what the issues were, and that the burden

9. was on appellee to prove by a fair preponderance of the evidence the material allegations of the complaint, the jury was further informed by instruction No. 5 that the theory of the complaint was that the proximate cause of the injury was the negligent escape of the fire from appellant's right of way to appellee's land, and "that a railroad company may be free from negligence in allowing combustible material to accumulate upon its right of way," and "permitting the same to be burned thereon," and that as

to whether appellant was guilty of negligence in allowing the fire to escape from its right of way was for the jury to determine.

It is insisted that this permitted the inference to be drawn by the jury that ordinarily a railroad company is guilty of negligence in allowing combustible material to accumulate on its right of way or in burning the same on the right of way, and inferentially put upon appellant the burden of showing in this cause that it was not negligent as charged. This instruction is not entirely free from the criticism offered, for, if it stood alone, a jury might be led to infer from the language employed that proof establishing the accumulation of the combustible material on the right of way, or the burning of the same thereon, would make out a cause of action on the part of appellee.

However, by instruction No. 6 the jury was informed, among other things, that if appellant permitted combustible material to accumulate as charged and allowed it to be burned on the right of way, it would have to use ordinary care to prevent the fire from escaping and injuring other lands. And by instruction No. 7 the jury was informed that if the evidence failed to show that the fire escaped from the right of way, as charged, through the negligence of appellant, it was not liable. By instruction No. 8 the jury was informed that there was no presumption that any of the material allegations of the complaint were true, and that there could be no recovery in the absence of establishing the material allegations of the complaint by the evidence, and that, if appellee failed to prove that whatever fire there was on the right of way was negligently suffered or permitted

Stout v. Stout, Admr.—68 Ind. App. 278.

to escape to his lands, there could be no recovery. When instruction No. 5 is considered, as it must be, in connection with the other instructions given (*Alexander v. Blackburn* [1912], 178 Ind. 66, 98 N. E. 711, Ann. Cas. 1915B 1091), appellant's rights were not prejudiced by the giving of the same, although it could have been couched in more appropriate language.

When the instructions given by the court are considered as an entirety, which they must be, the issues were fully covered thereby; they were applicable to the facts and seem to fairly state the law of the case. No error was committed by the court in refusing any of the tendered instructions.

We find no error calling for a reversal of the judgment. Judgment affirmed.

Ibach, J., dissents.

NOTE.—Reported in 114 N. E. 475. Railroads: duty of owner of property abutting on a railroad right of way to protect it from fires set out by passing locomotives, 12 L. R. A. (N. S.) 526, 49 L. R. A. (N. S.) 166. See under (1) 33 Cyc 1381; (2, 4) 33 Cyc 1344; 6-8) 33 Cyc 1397, 1398.

STOUT ET AL. v. STOUT, ADMINISTRATOR.

[No. 9,470. Filed December 20, 1916. Rehearing denied March 30, 1917. Transfer denied June 28, 1918.]

1. APPEAL.—*Judgments Appealable.—Finding on Exceptions to Administrator's Report.—Interlocutory Order.—Statutes.*—On exceptions to an administrator's final report, a finding ordering him to file an amended report charging certain advancements is not a final and appealable judgment within the meaning of §671 Burns 1914, §632 R. S. 1881, nor is the order an interlocutory order from which an appeal is authorized by §1392, cls. 15-18, Burns 1914, Acts 1907 p. 237. p. 282.

Stout v. Stout, Admr.—68 Ind. App. 278.

2. **COURTS.**—*Rule of Decision.*—*Decision of Supreme Court.*—The decisions of the Supreme Court are binding upon the Appellate Court, except as provided in §1394, cl. 1, Burns 1914, Acts 1901 p. 565, authorizing either division of the Appellate Court to transfer a case to the Supreme Court where two of the judges of such division are of the opinion that a ruling precedent of the Supreme Court is erroneous. p. 282.
3. **APPEAL.**—*Judgments Appealable.*—*Finding on Exceptions to Administrator's Report.*—*"Decision."*—*Statutes.*—Under §2977 Burns 1914, §2454 R. S. 1881, §2978 Burns 1914, Acts 1913, p. 65, authorizing an appeal by any person aggrieved by any "decision" growing out of any matter connected with a decedent's estate and providing a method for taking such appeals, an appeal will not lie from a decision which is not a final judgment within the meaning of §671 Burns 1914, §632 R. S. 1881, or an appealable interlocutory order within the terms of §1392, cls. 15-18, Burns 1914, Acts 1907 p. 237, the word "decision," as used in §§2977, 2978 being intended to embrace only final judgments and interlocutory orders appealable under the general practice acts. p. 284.

From Wells Circuit Court; *Evans M. Cole*, Judge *pro tem*.

Charles W. Stout, administrator of the estate of Reuben Stout, deceased, filed his final report, and Ira Stout and others excepted thereto. From the finding made, the objectors appeal. *Appeal dismissed.*

H. B. Spencer, J. W. Moffett, Abram Simmons and Charles G. Dailey, for appellants.

Charles E. Sturgis and Robert W. Stine, for appellee.

HOTTEL, J.—Reuben Stout died intestate on April 1, 1914, leaving as his only heirs at law, his children, Charles W. Stout and Cerilda Williams, his grandchildren, the appellants, Ira Stout, Andrew Stout, Harry Stout and Viola Stout, children of William C. Stout, a son of intestate, who died before his father, and two great-grandchildren, Mabel Smith and Helen

Smith, daughters of Jennie Smith, who was a daughter of said William C. Stout, and who died prior to the death of said intestate.

Charles W. Stout was appointed and qualified as the administrator of intestate's estate, and, on May 5, 1915, filed his final report, in which he showed that he had distributed the sum of \$4,776.06, the assets of the estate on hand for distribution, as follows: to Charles W. Stout, one-third part; to Cerilda Williams, one-third part; to Ira Stout, one-fifteenth part; to Andrew Stout, one-fifteenth part; to Harry Stout, one-fifteenth part; to Viola Stout, one-fifteenth part; to Mabel Smith, one-thirtieth part; and to Helen Smith, one-thirtieth part. The report showed that all debts and liabilities of the estate had been paid, and all assets thereof fully administered. Prayer that the report be approved, the administrator discharged, and the estate closed.

Appellants filed exceptions to this report on the ground that intestate, in his lifetime, made certain advancements and conveyances to Charles W. Stout and Cerilda Williams, that when said advancements and conveyances were made, and long prior thereto, said intestate was of unsound mind, that said advancements and conveyances are a part of the personal estate of said intestate, and should have been, but were not, accounted for by the administrator in said report.

Said administrator replied to said exceptions: (1) In general denial; (2) that said intestate, in his lifetime, gave to William C. Stout, as an advancement, money and property of the value of \$3,856.58, which exceeded the amount of any advancement to said Cerilda Williams or said Charles W. Stout; (3) that said William C. Stout, at the time of his death, was

indebted to said intestate in the sum of \$2,593.58, which has never been paid, and which should be charged against and deducted from the amount due appellants as their share of said estate.

There was a trial by the court, and pursuant to a request therefor, the court made a special finding of facts and stated conclusions of law thereon.

For the purposes of this opinion, it is sufficient to say that the finding of the court was in effect a finding that the report was in all respects correct, except as to certain advancements, which the court found the decedent had made to certain of his children, which advancements the court found should have been, but were not, taken into account in the distribution made by such administrator. Upon its finding of facts the court stated conclusions of law, which need not be set out.

The record then shows the following entry, of September 28, 1915: "The court now renders judgment on the conclusions of law upon the special findings of facts. It is therefore considered and adjudged by the court that Charles W. Stout, administrator of the estate of Reuben Stout, shall make and file an amended report, in which Cerilda Williams shall be charged with an advancement in the sum of \$3,750.00 and said Charles W. Stout shall be charged with an advancement in the sum of \$3,500.00, and said heirs of William C. Stout, namely: Ira Stout, Andrew Stout, Harry Stout, Viola Stout, Mabel Smith, and Helen Smith, shall be charged with an advancement in the sum of \$3,856.58 as having been made to the said William C. Stout. It is further considered and adjudged by the court that said Charles W. Stout, as administrator of the estate of Reuben

Stout, deceased, shall pay the costs of this proceeding out of the proceeds of said estate before distribution is made."

It is from this order that appellants prosecute this appeal.

This is not a final judgment within the meaning of §671 Burns 1914, §632 R. S. 1881, and the authorities construing such section. *Leach v. Webb* (1916),

1. 62 Ind. App. 693, 113 N. E. 311; *Pfeiffer v. Crane, Gdn.* (1883), 89 Ind. 485; *Thiebaud v. Dufour*, (1877), 57 Ind. 598, and cases there cited; *Wood v. Wood* (1875), 51 Ind. 141; *Goodwin v. Goodwin* (1874), 48 Ind. 584; *Angevine v. Ward* (1879), 66 Ind. 460; *Mak-Saw-Ba Club v. Coffin* (1907), 169 Ind. 204, 210, 213, 82 N. E. 461, and cases there cited.

Nor is the order appealed from one of the interlocutory orders from which an appeal is authorized by subdivisions 15, 16, 17 and 18, of §1392 Burns 1914, Acts 1907 p. 237. *Thiebaud v. Dufour, supra*, and cases there cited; *Pfeiffer v. Crane, Gdn., supra*.

In this connection, we deem it proper to say that a majority of this court recognize that in cases like the one here involved an apparent hardship and injustice results from the interpretation and construction given to said §671 Burns 1914, *supra*. This fact, though not referred to in the opinion, was given consideration by this court in the recent case of *Leach v. Webb, supra*, but we felt that under the decisions of the Supreme Court there cited and followed the question involved was not an open one.

The decisions of the Supreme Court are binding upon this court, except as provided in §1394 Burns 1914, Acts 1901 p. 565, which authorizes either

2. division of this court to transfer a case to the Supreme Court for disposition where two of

the judges of such division "are of the opinion that a ruling precedent of the Supreme Court is erroneous." In view of the fact that the interpretation and construction of said §671 above indicated seems to be so thoroughly established and long recognized, it might be better that any apparent injustice which may result therefrom in cases of this character be corrected by legislation rather than by a change of judicial construction or interpretation. If the Supreme Court should be of a different opinion the second subdivision of said §1394, *supra*, provides a method whereby the appellant may get the benefit of the judgment of that court on said question.

For the reasons above indicated, the appeal is dismissed.

ON PETITION FOR REHEARING.

HOTTEL, J.—Appellants have filed a petition in this cause, in which they ask a rehearing herein, and that such cause be reinstated as a cause pending in this court for disposition on its merits.

Six reasons are assigned by appellants in their petition for the relief asked therein. The gist of their contention, however, urged in their brief, is expressed in their third reason, which is as follows: "The court erred in holding and deciding that this appeal should be dismissed because a final judgment had not been rendered within the meaning of section 671, and because the said appeal was not from one of the interlocutory orders from which an appeal is authorized by subdivisions 15, 16, 17 and 18, of section 1392, Burns 1914, for the reason that this appeal is prosecuted under sections 2977 and 2978, Burns 1914, which fully authorize and provide for the appeal in this cause."

This reason correctly interprets the effect of the original opinion herein, and is also correct in stating that the appeal was prosecuted under said

3. §§2977, 2978, *supra*, of the decedent's act.

While the original opinion fails to mention the fact that this appeal was prosecuted under said sections of the decedent's act, such fact was not overlooked in our original consideration and disposition of the case. In such opinion we made no attempt to distinguish between the finality of the judgment or the kind of interlocutory order that may be appealed from under said sections, and the finality of the judgment or kind of interlocutory order that may be appealed from generally in civil cases under §671, *supra*, and subdivisions 15, 16, 17 and 18 of §1392, *supra*, because we thought that the authorities which we cited in support of our opinion hold in effect that in either case the only judgment or decision of the trial court from which an appeal is authorized is a judgment that is final within the meaning of §671, *supra*, or an interlocutory order named in the subdivisions, *supra*, of §1392 Burns 1914, *supra*.

Such is the effect of the original opinion, and among the cases cited in its support is that of *Thiebaud v. Dufour* (1877), 57 Ind. 598, in which it is expressly held that: "No appeal will lie from an interlocutory order under section 189 of the decedent's act, 2 R. S. 1876, p. 557, except such as are embraced in section 576 of the practice act, 2 R. S. 1876, p. 245." In support of this statement several cases are there cited.

Section 189 of the decedent's act referred to in the language quoted provides for an appeal by any person aggrieved by any *decision* of a court of common

pleas growing out of any matter connected with a decedent's estate, and for the purpose of the question under consideration may be treated as identical with §2977 Burns 1914, *supra*.

Section 576, referred to in said quoted language, is a section of the practice act designating the interlocutory orders from which an appeal is authorized, and hence, for the purposes of the question under consideration, is the same as subdivisions 15, 16, 17 and 18 of §1392 Burns 1914, *supra*.

The Supreme Court in the case of *Pfeiffer v. Crane, Gdn.* (1883), 89 Ind. 485, also cited in the original opinion, expressly held that appeals from interlocutory orders "can be taken in four cases only," naming the cases designated in §646 R. S. 1881, which is the same as said §576, *supra*, of said practice act of 1876 and the Code of 1852, and substantially the same as subdivisions 15, 16, 17 and 18 of §1392, *supra*. This case cites with approval the case of *Thiebaud v. Dufour, supra*.

We have carefully examined the cases cited and relied on by appellant and find nothing in any of them in conflict with the decisions *supra*. They hold in effect and necessarily so we think, that when an appeal is prosecuted from any decision "growing out of a matter connected with a decedent's estate," the appeal must be prosecuted in the manner and within the time prescribed by said §§2977, 2978, *supra*. To hold otherwise would be to render said sections a nullity, because the purpose of their passage was to furnish a *method of and time for* appeal different from that prescribed in the ordinary civil case.

However, in this connection, it should be stated that in our investigation of this question and the decided

cases affecting it we have found a case, viz., *Taylor v. Burk, Exr.* (1883), 91 Ind. 252, which seems to be out of harmony with the cases above cited. This case contains language which seemingly gives to the words "any decision," as used in said §2977, *supra*, a meaning that will permit appeals under such section from judgments not final within the meaning of §632 R. S. 1881 (being §671 Burns 1914). Several cases are cited, none of which support such announcement, but all of which are to the effect above indicated, viz., that appeals from cases governed by said decedent's act must be prosecuted in the manner and within the time provided by such act.

However, independent of said decisions, it seems to us that no good reason can be given for construing said §2977, *supra*, as authorizing appeals taken under said act in any case where the judgment sought to be appealed from was neither a final judgment within the meaning of §671 Burns 1914, *supra*, nor an interlocutory order from which an appeal is authorized by subdivisions 15, 16, 17 and 18 of §1392, *supra*.

Such was not the intent or purpose of said act. On the contrary, the purpose and intent of the legislature in the passage of said act, as before stated, was to provide a different method of appeal in cases of decisions growing out of any matter connected with the settlement of decedent's estates, where the decision sought to be appealed from was one that was appealable under the general practice acts, the main purpose of the act being to prevent delay in the settlement of decedents' estates. *Browning v. McCracken* (1884), 97 Ind. 279, 281; *Seward v. Clark, Admr.* (1879), 67 Ind. 289, 297; *Vail v. Page* (1910), 175 Ind. 126, 130, 93 N. E. 705; *Miller, Admr., v. Carmichael* (1884), 98 Ind. 236.

The word "*decision*" used in said act was, no doubt, used advisedly instead of the word "judgment," but with no intent or purpose to authorize an appeal in any case where the judgment sought to be appealed from was neither final nor an interlocutory order from which an appeal was authorized under said general practice acts, but rather to authorize an appeal, either from a final judgment within the meaning of §671, *supra*, or from any interlocutory order from which an appeal is authorized by the general practice act, the word "*decision*" being used because it was broad enough to include both the final judgments and the interlocutory orders from which an appeal was authorized under such general practice acts.

To give to such work and said section of the decedent's act of which it is a part any other interpretation or meaning would be to say in effect that by such act the legislature intended to authorize any person aggrieved by any *ruling* growing out of a matter connected with a decedent's estate the right of appeal from such *ruling*. This is so because the word "decision" must have been used with reference to and meaning in effect final judgments and interlocutory orders from which an appeal would lie under the practice act, or otherwise it was used in the sense of "ruling," and hence would permit an appeal from any decision without regard to its finality, or the character of the order or ruling involved, whether interlocutory or otherwise, and hence, to a great extent, defeat the controlling purpose of said act indicated in numerous decisions, some of which we have cited, *supra*, in that such an interpretation would prevent the speedy closing up of estates, and embar-

pass the settlement thereof by delays resulting from appeals from interlocutory orders from which no appeal would lie under the acts governing the ordinary civil case.

By what we have said we do not mean to be understood as saying that the instant case is one from which no appeal should lie, but simply that §2977, *supra*, should be construed in the light of said sections of the civil procedure acts, *supra*, declaring what cases are appealable, and the interpretation placed thereon by the Supreme Court. Indeed, we think, as suggested in the original opinion, that the instant case is one in which an appeal should be authorized, but, if it is in fact an interlocutory order, it is not one of those from which an appeal is authorized by said subdivisions 15, 16, 17 or 18, §1392, *supra*, and legislative enactment would be necessary to put decisions like it within the appealable class.

We feel sure, also, that under the cases cited in the original opinion, to some of which we have called attention, *supra*, said decision is not a final judgment within the meaning of §671 Burns 1914, *supra*, as construed and interpreted by said decided cases. If said cases have placed too narrow a construction and interpretation on the character of the judgment that was intended to be included in the words "final judgment," as used in said §671, and such interpretation should be broadened so as to include cases like the one here involved, the duty and power to make such a change is in the Supreme Court. In neither case, as we view the law, does such duty or power rest in this court.

However, we deem it proper to suggest in this connection that, in our opinion, appellant is not without

a remedy under the existing law as interpreted by the decisions, *supra*, upon which this opinion is based. In other words, our holding that the decisions from which the appeal is prosecuted is neither a final judgment nor an interlocutory order of a kind from which an appeal is authorized by the sections of the statute, *supra*, does not necessarily mean that such decision is one from which the party against whom it is rendered has no remedy by way of appeal. On the contrary, such decision is a ruling or interlocutory order made upon the hearing of evidence preliminary to the approval of the final report and discharge of said administrator, upon which error may be predicated and taken advantage of on an appeal from the final judgment in such proceeding when rendered.

Said decision made necessary the filing of an amended final report by said administrator, and hence delayed the rendition of a final judgment until such amended report is filed. When this report is filed, a judgment approving it and adjudging that said estate has been fully and finally settled, and that such administrator be discharged, will be a final judgment within the meaning of §671, *supra*, and hence a judgment from which an appeal may be prosecuted. Appellants, or any party aggrieved by the preliminary ruling or decision from which this appeal is prosecuted, would have the thirty days fixed by §587 Burns 1914, Acts 1913 p. 848, from the date of such final judgment (or if the decision or finding, special or general, upon which such final judgment is rendered be made at a date preceding such judgment, then thirty days from such decision or finding) within which to file a motion for a new trial. As grounds for such motion appellant may include any ruling

affecting the decision from which this appeal is prosecuted that is properly presented by such a motion. If he obtains an adverse ruling on such motion, he may then appeal from the final judgment, in which case the time and manner of his appeal is controlled by §2977 *et seq.*, *supra*. In such appeal he may then present to the appellate tribunal for review the ruling on his said motion for a new trial, as well as all other errors affecting such decision to which proper exceptions have been saved, provided, of course, that such rulings be presented in the manner and method recognized and approved by the decisions governing appellate procedure.

For these reasons, the petition for a rehearing and to reinstate this cause is overruled.

NOTE.—Reported in 114 N. E. 473, 115 N. E. 594.

BUCKINGHAM ET AL. v. KERR, TREASURER OF UNION CITY.

[No. 9,593. Filed October 10, 1918.]

1. MUNICIPAL CORPORATIONS.—*Statute.—Street Improvements.—Construction.*—In ascertaining the legislative intent in enacting §8710 *et seq.* Burns 1914, Acts 1905 p. 236, as amended, Acts 1909 p. 412, relative to assessments for street improvements, etc., the court must consider the question in the light of the rule requiring such statutes to be strictly construed. p. 294.
2. MUNICIPAL CORPORATIONS.—*Street Improvements.—Assessments.*—The process prescribed by §8716 Burns 1914, Acts 1909 p. 412, for determining what property is "liable to be assessed" for proposed street improvements is essentially one of taxation. p. 294.
3. MUNICIPAL CORPORATIONS.—*Street Improvements.—Assessments.—Property Affected.—Statute.*—The provision in §8714 Burns 1914, Acts 1909 p. 412, that property abutting on a street to be improved shall be primarily assessed without regard to depth is not intended

to extend the limits of the special tax district beyond 150 from the line of the street as provided by §8716 Burns 1914, Acts 1909 p. 412. p. 294.

4. MUNICIPAL CORPORATIONS.—*Street Improvements.—Excessive Assessments.—Remedy.*—Though a lot is of such little depth that its portion of the primary assessment for street improvements exceeds its value, the entire portion of such assessment must be levied upon it; but a readjustment to avoid confiscation may be made after a hearing under §8714 Burns 1914, Acts 1909 p. 412. p. 295.
5. MUNICIPAL CORPORATIONS.—*Street Improvements.—Assessments.—Apportionment as Between Adjacent Owners.*—Though special assessments for street improvements are levied primarily on the property adjoining the street, the common council may, after a hearing under §8714 Burns 1914, Acts 1909 p. 412, relieve an owner of such adjoining property from an inequitable assessment by transferring a portion of the primary assessment to adjacent property lying back of that adjoining the street and within the assessment district; and in such case the element of diverse ownership may not be ignored, since a levy of the entire assessment on the two tracts without an apportionment of a specific share to each might result in irremediable injustice. p. 295.
6. MUNICIPAL CORPORATIONS.—*Street Improvements.—Assessments.—Apportionment.*—The plan provided in §8714 Burns 1914, Acts 1909 p. 412, for carrying back a portion of the primary assessment for street improvements from property abutting the street and distributing it on successive tracts in the rear; constitutes the only method by which such adjacent tracts may be assessed, whether there be diverse ownership or not. p. 295.
7. MUNICIPAL CORPORATIONS.—*Street Improvements.—Assessments.—Property Liable.*—In carrying back from abutting property to adjacent tracts portions of the primary assessment for street improvements, under §8714 Burns 1914, Acts 1909 p. 412, no intervening tract may be ignored, but the several tracts must be assessed consecutively; in this manner portions of the primary assessment may be carried back 150 feet, though no assessment can extend across another street, even if owned by the same person and within 150 feet. p. 295.
8. MUNICIPAL CORPORATIONS.—*Street Improvements.—Power of Common Council.—Nature of.*—Though the action of the common council in levying street improvement assessments bears some resemblance to judicial action, the council is not even an inferior court, and therefore cannot exercise judicial power; the only instance in which the council acts independently or quasi-judicially is in carrying back portions of the primary assessment from abut-

ting property to adjacent tracts, all other powers in levying assessments being purely ministerial. pp. 297, 298.

9. MUNICIPAL CORPORATIONS.—*Street Improvements.—Assessments.—Injunction.—Collateral Attack.*—Where the common council levied an assessment for street improvements on property that did not abut on the street and was not adjacent to abutting property, but was separated therefrom by another public thoroughfare, though it belonged to parties owning the abutting property, the action was void; and it was not necessary for the owners to appear in the proceeding to protect their rights or to seek relief by appeal to the circuit court, but they could bring a separate action to enjoin the illegal assessment, since the only question reviewable on appeal to the circuit court is the amount of the assessment, the right of appeal being expressly denied as to an assessment on property not liable. pp. 299, 300.
10. ESTOPPEL.—*Pleading.—Demurrer.—Raising Defense.*—Since an estoppel must be specially pleaded, the question of its existence may not be raised by demurrer to the complaint. p. 300.

From Randolph Circuit Court; *Theodore Shockney*, Judge.

Action by Jefferson M. Buckingham and others against Elmer Kerr, treasurer of Union City. From a judgment for the defendant, the plaintiffs appeal. *Reversed.*

L. L. Taylor, Macy, Nichols, Goodrich & Bales, for appellants.

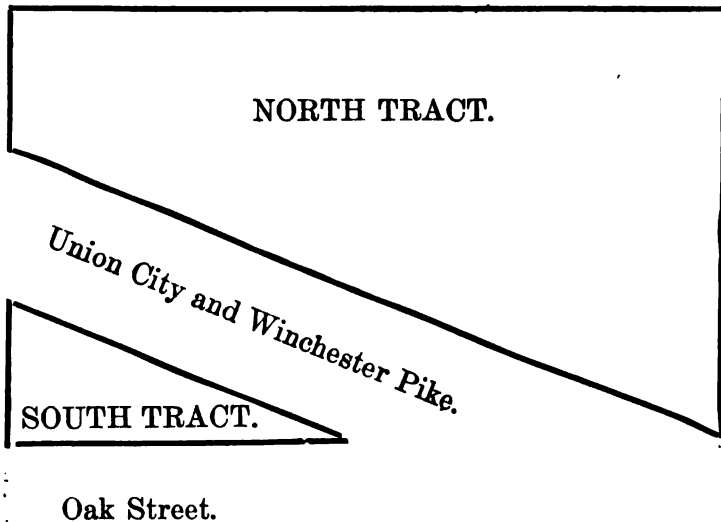
Shockney & Chattin, for appellee.

DAUSMAN, J.—The thirteen appellants herein are the heirs of one Benjamin F. Buckingham, deceased, and they instituted this action against appellee to enjoin the sale of a tract of land for the collection of a special assessment levied thereon in a street improvement proceeding.

The complaint discloses the following facts: Appellants own land in Union City. A public street of said city, known as the Union City and Winchester Pike, runs diagonally across their land from north-

west to southeast, and divides it into two separate and distinct tracts. Another public street of said city known as Oak street, runs east and west. The Union City and Winchester Pike merges into Oak street. The south tract of appellants' land is triangular, and lies between the two streets. The north tract does not abut on Oak street.

Under the supervision of the common council Oak street was improved by paving. The cost of paving that part of Oak street representing the junction of two streets was paid by the city. Appellants' tracts of land were not assessed separately; but the sum of \$570.80 was levied on both tracts, as if the two in reality constituted a single tract. Appellants ask that the court enjoin the sale of the north tract only. The following diagram will aid in understanding the averments of the complaint.



A demurrer to the complaint for want of facts was sustained, and appellants refused to plead further. Judgment accordingly.

(1) The question presented by this appeal calls for an interpretation of those sections of the statute by which the legislature conferred on municipi-

1. palities the power to levy special assessments on real estate for the purpose of collecting a fund with which to pay in whole or in part the cost of improving streets by paving. §8710 *et seq.* Burns 1914 (Acts 1905 p. 236, as amended, Acts 1909 p. 412). While endeavoring to ascertain the legislative intent, we must keep constantly in mind the rule that statutes of this kind are to be strictly construed. *City of Frankfort v. State* (1891), 128 Ind. 438, 27 N. E. 1115; *Barber Asphalt Pav. Co. v. Edgerton* (1890), 125 Ind. 455, 461, 25 N. E. 436.

When levying these special assessments the common council is exercising the power of taxing, and is exercising that power in a very special way. Naturally, therefore, the plan suggests the need for a special tax district.

The first step in street improvement under this statute is the adoption of a preliminary resolution declaring the intention to make the improvement.

2. Notice is then given to all persons whose property is "liable to be assessed." Before proceeding further the common council must de-

3. cide whether the benefits to the property "liable to be assessed" for the improvement will equal the estimated cost thereof. How is the common council to know what property is "liable to be assessed?" The legislature has determined that by prescribing a special tax district. In §8716, *supra*,

it is called "the benefit district." This language may disguise, but cannot alter, the fact that the process is essentially one of taxation. The legislature has fixed the maximum limits of the special tax districts at 150 feet from either line of that portion of the street to be improved. No land outside this district is "liable to be assessed" in any event. True, the statute provides that lots bordering on the street to be improved shall be primarily assessed without regard to their depth; but this provision is not intended to enlarge the special tax district. It is for another purpose.

It may happen that an abutting lot is of little depth, and that its portion of the primary assessment exceeds its value. Nevertheless that entire

4. portion must be levied upon it; but a readjustment to avoid confiscation may be made after a hearing. §8714 Burns 1914, *supra*.

But it does not follow that all land within that district is "liable to be assessed." The legislature assumed that the land within any special tax

5. district probably would be divided into tracts; and it has ordained that the tracts abutting on the street to be improved shall be primarily
6. liable, and that adjacent tracts shall be secondarily liable only. In this connection the legislature has had a proper regard for the element
7. of diverse ownership. It may happen that certain land within the special tax district is divided in ownership in such manner that the front tract, abutting on the street to be improved, is owned by A; and that the next tract back of A's, and having no street frontage, is owned by B. In that case A's land is primarily liable, as abutting land, for the

entire assessment computed according to the number of linear feet on the street line, and B's land is not primarily liable for any assessment whatsoever. But if it should be unfair as between A and B to burden A's land with the entire assessment, the common council, after the parties have had a hearing, may relieve A's land by transferring a portion of the primary assessment to the land of B, thus distributing the primary assessment in such amounts as will be equitable to these owners. In such cases the element of diverse ownership may not be ignored; for if the entire assessment should be levied on the lands of A and B, without apportioning a specific share to each, irremediable injustice might result. If there should be unity of ownership of such tracts the reason for assessing a specific amount upon each tract is not so apparent. Nevertheless this plan of carrying a portion of the primary assessment back from the tract abutting on the street and distributing it on the successive tracts in the rear, constitutes the only method by which "adjacent" lands may be assessed, whether there be diverse ownership or not. In carrying back portions of the primary assessment the several tracts must be assessed in their consecutive order. No intervening tract may be ignored. In this manner portions of the primary assessment may be carried back 150 feet from the street line, but no further. However, to the last statement there is an exception, viz., no assessment, whether primary or secondary, can extend to land across another street, even though the land on either side of such other street is owned by the same person and is within 150 feet of the street to be improved. In other words, if there be a parallel or diagonal street within 150

feet of the street to be improved, the effect is to cut off and put outside the special tax district a portion of the land which otherwise would be within that district, and the area of the special tax district is thereby accordingly reduced. This was the holding of the Supreme Court under the prior statute. *City of Frankfort v. State, supra*. And we are of the opinion that it is a fair conclusion to be drawn from all the provisions of the statute now in force.

But appellee contends that, regardless of other considerations, this action must fail (1) because it is a collateral attack on the decision of the common council; (2) because the landowner had the right of appeal to the circuit court; and (3) because of the law of estoppel.

It is true that the action of a common council in levying street improvement assessments is *quasi-judicial*; that is to say, it has some resemblance

8. to judicial action. But the common council is not a court—not even an inferior court, and therefore cannot exercise judicial power. *Flournoy v. Jeffersonville* (1861), 17 Ind. 169, 79 Am. Dec. 468; *State, ex rel. v. Board, etc.* (1874), 45 Ind. 501; *Waldo v. Wallace* (1859), 12 Ind. 569, 583; *Shoultz v. McPheeters* (1881), 79 Ind. 373; *Little v. State* (1883), 90 Ind. 338, 46 Am. Rep. 224; *Pressley v. Lamb* (1886), 105 Ind. 171, 4 N. E. 682; *Vandercook v. Williams* (1885), 106 Ind. 345, 1 N. E. 619, 8 N. E. 113; *State, ex rel. v. Noble* (1889), 118 Ind. 350, 21 N. E. 244, 4 L. R. A. 101, 10 Am. St. 143; *State, ex rel. v. Denny* (1889), 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79; *State, ex rel. v. Hyde* (1889), 121 Ind. 20, 22 N. E. 644; *Board, etc. v. Stout* (1893), 136 Ind. 53, 35 N. E. 683; *Miller v. State* (1897), 149 Ind. 607, 49 N. E. 894, 40

L. R. A. 109; *Betts v. New Hartford* (1856), 25 Conn. 180; *Foot v. Stiles* (1874), 57 N. Y. 399. The truth is that the proceeding of a common council in a street improvement matter which results in the imposition of a special assessment bears a very faint resemblance to the proceeding of a court in a civil action which results in the rendition of a judgment. To adopt this meager analogy as the basis of reasoning when determining the validity of a special assessment serves only to confuse.

Every administrative officer in the discharge of his daily duties must determine for himself the facts on which he acts and must construe and apply the law. Nevertheless, where there is no right of appeal his decisions are subject to review by the courts when attacked collaterally. To hold otherwise would be to clothe a ministerial officer with power to inflict upon the citizen gross injustice and oppression by perverting the law and distorting the facts. *Dorn v. Backer* (1874), 61 N. Y. 261; *Matter of New York Catholic Protectory* (1879), 77 N. Y. 342; *Beardslee v. Dolge* (1894), 143 N. Y. 160, 38 N. E. 205, 42 Am. St. 707. The same rule is applicable to administrative boards and commissions, and to such governmental agencies as common councils of cities, when acting in an administrative capacity.

The duty to determine whether any abutting tract should be relieved of a portion of the primary assessment rests upon the common council; and if it

8. concludes that such relief should be granted, then the further duty rests upon it to determine the portion which should be carried back to each consecutively adjoining tract. This is the only instance in the process of levying assessments where-

in the common council is authorized to use its own independent judgment, and is the only instance wherein it rightly may be said that the common council acts *quasi* judicially. (There is no such action involved in this case.) All the rest is fixed arbitrarily by the statute; and in levying all other assessments the common council acts in a purely ministerial capacity.

Did the common council have authority in law to assess appellants' north tract? In other words, did the common council in making the pretended

9. assessment act in accordance with the law and the facts? Evidently the legislature was of the opinion that it would be unwise to give the common council a free hand in the matter of levying assessments. The power of the common council to levy assessments is limited to lands "liable to be assessed." This feature runs throughout the statute and is emphasized by the frequent repetition of the words "liable to be assessed." The legislature has determined what lands are liable to be assessed, and the common council has no authority to assess any other land. The statute enables the owner of real estate to know in advance whether his land is liable to be assessed. If under the statute his land or any part of it is not liable to be assessed, even though it be located in the neighborhood of the proposed improvement, he need not appear before the common council at any stage of the proceeding for the purpose of protecting his property from an unlawful assessment; but he may rest in the assurance afforded by the statute.

From the averments of the complaint it clearly appears that appellants' north tract does not abut on

the improved street; that it is not adjacent to
9. the improved street in the sense that it is liable for a portion of any primary assessment that might be carried back from abutting land between it and the improved street; and, finally, that it is separated from the improved street by another public thoroughfare. It follows that the common council had no authority to assess said north tract and that the pretended assessment thereon is void.

(2) On appeal to the circuit court the only question that may be reviewed is the amount of the assessment. To avail himself of the benefit of an appeal to the circuit court a landowner must admit, at least for the purpose of the appeal, that his land is liable to be assessed for some amount. As to lands not liable to be assessed, the right of appeal is expressly denied. §8716, *supra*. In the case at bar the only remedy is by injunction.

(3) The question of estoppel did not arise on the demurrer. Estoppel must be specially pleaded.

Work's Practice §606; *Webb v. John Hancock*,

10. *etc.*, *Ins. Co.* (1903), 162 Ind. 616, 69 N. E. 1006, 66 L. R. A. 632; *Troyer v. Dyar* (1885), 102 Ind. 396, 1 N. E. 728.

The judgment is reversed; and the trial court is directed to overrule the demurrer.

Caldwell, C. J., did not participate in the disposition of this cause.

NOTE.—Reported in 120 N. E. 422. Liability of abutting owner to pay assessments for public improvements, 18 L. R. A. (N. S.) 1259, 29 L. R. A. (N. S.) 770. See under (3, 4) 28 Cyc 1123; (5) 28 Cyc 1185; (9) 28 Cyc 1183.

Lesh v. Rockcreek, etc., Ins. Co.—68 Ind. App. 301.

LESH v. ROCKCREEK TOWNSHIP FARMERS' MUTUAL
INSURANCE COMPANY.

[No. 9,663. Filed October 10, 1918.]

1. PLEADING.—*Exhibits.—Variance.*—A fire insurance policy filed as an exhibit to a complaint will control, as to property insured, if there is any variance between its provisions and the allegations of the pleading. p. 304.
2. INSURANCE.—*Fire Insurance.—Personalty Continuously in One Place.*—In policies covering personal property that, from its character and ordinary use, is kept continuously in one place, as merchandise, machinery kept in a building, household furniture, or goods stored, the location of the property designated in the policy is an essential element of the risk and usually a continuing warranty. p. 305.
3. INSURANCE.—*Fire Insurance.—Location of Property.*—Where property insured is of such character that its temporary removal or absence from the specified place is necessarily incident to its use and enjoyment, the presumption is, unless precluded by the language, that the parties contemplated such use when the policy was executed. p. 305.
4. INSURANCE.—*Fire Insurance.—Complaint.—Location of Property.*—Where a complaint on a fire policy to recover for the destruction of farming utensils, buggies, harness, etc., failed to allege that the property, when destroyed or at any other time, was in the barn and sheds designated in the policy, or that such buildings were the usual and accustomed places for keeping the property, or that it had been taken therefrom in its ordinary use and moved temporarily to the place where it was destroyed, but on the contrary expressly alleged that it was the plaintiff's custom to keep the property at the place where it was destroyed, the pleading was insufficient as failing to show that the property was covered by the policy. p. 307.

From Wells Circuit Court; *W. H. Eichhorn*, Judge.

Action by Homer A. Lesh against the Rock Creek Township Farmers' Mutual Insurance Company. From a judgment for the defendant, the plaintiff appeals. *Affirmed.*

Lesh v. Rockcreek, etc., Ins. Co.—68 Ind. App. 301.

A. W. Hamilton, for appellant.

Charles E. Sturgis and *Robert W. Stine*, for appellee.

BATMAN, J.—This action was brought by appellant against appellee to recover a loss under a fire insurance policy. Appellee filed a demurrer to appellant's amended complaint, which was sustained. Appellant refused to plead further, and judgment was rendered against him accordingly. From this judgment appellant appealed and has assigned the action of the court in sustaining appellee's demurrer to his amended complaint as the sole error on which he relies.

The amended complaint alleges in substance, among other things, that appellee is a corporation, organized under the laws of the State of Indiana, and engaged in writing fire insurance on farm property; that on April 9, 1909, appellee issued to him a fire insurance policy, expiring on April 5, 1914; that the consideration for said policy was \$43.75, which has been fully paid; that said policy covered his property in Rockcreek township, Wells county, Indiana, in the sum of \$3,500; that by its terms appellee agreed to reimburse him for loss or damage by fire or lightning to grain, seed, hay, fodder, farming utensils, buggies, carriages, light harness and robes, in the sum of \$400; that on December 5, 1912, he was the owner of the following described property of the value of \$800, to wit, one binder, one mower, two-row corn plow, one check rower, one gang plow, 1,400 bushels of oats, three tons of hay, and many other articles; that said property was destroyed by fire on said date, while the policy was in full force; that

Lesh v. Rockcreek, etc., Ins. Co.—68 Ind. App. 301.

said property was described in the policy as being located in the west half of the southwest quarter of section 15, township 27 north, range 11 east, in Wells county, Indiana; that he was the owner of said land, but was also farming the land of his mother across the road from his said farm at the time the policy was issued, and continued to farm the same during the life thereof; that at the time of the issuance of the policy, and ever afterwards until the fire, it was his custom to keep his farming utensils, hay, grain and other personal property, or a part thereof, on his mother's farm, and in the buildings thereon, which facts were known to the officers of appellee when the policy was issued, and during the life thereof; that all of the above-named personal property was destroyed on his mother's farm, where the same was located when the fire occurred; that immediately after the fire he notified the officers of appellee of the loss, who duly visited the premises where the fire occurred, and duly appraised the amount of the loss due him at \$400; that after the loss of said property by fire, and after all the facts connected therewith, including its location when destroyed, were fully known to the officers of appellee, he paid the last installment of premium on the policy; that on the — day of April, 1915, appellee, and a large number of its policyholders and officers, met, after due notice had been given and received, for the transaction of business at the appointed time and place; that a part of the business to be transacted at such meeting was the adjustment of his said loss; that all matters pertaining to his said loss, including the location of his property when destroyed by fire, were fully known to those in attendance; that at said meeting

a motion was duly made and carried that he be reimbursed for his loss in the sum of \$400, and said action was entered of record in the minutes thereof. A copy of the policy was filed with the amended complaint and made a part thereof as an exhibit. The portion thereof material to a determination of the question before us being as follows:

“By this policy of insurance, the Rockcreek Township Farmers’ Mutual Insurance Association, in consideration of Eight 75-100 dollars to them in hand, paid by the assured hereinafter named, the receipt whereof is hereby acknowledged, and one installment note of thirty-five dollars, do insure H. A. Lesh of Rockcreek Township, Wells County, in the State of Indiana, against loss or damage by fire or lightning to the amount of thirty-five hundred dollars, for the period of five years as follows: * * *

On barn, and sheds adjoining.....\$800.00

On grain, seed, hay, fodder, farming
utensils, buggies, carriages, light har-
ness and robes therein.....\$400.00

* * * Situated on the west one-half of the southwest quarter, section 15, township 27 north, range 11 east, in Wells County, State of Indiana.”

Appellee asserts in the memorandum filed with its demurrer that the amended complaint alleges facts which show that the property alleged to have

1. been destroyed by fire was not included in, or covered by, the policy of insurance sued on in this action. We will first consider this contention, for if it be sustained the action of the court in its

Lesh v. Rockcreek, etc., Ins. Co.—68 Ind. App. 301.

ruling on the demurrer was clearly right. In this connection it should be noted that the policy itself provides for a certain amount of insurance on appellant's barn and shed adjoining and for insurance in the sum of \$400 "on grain, seed, hay, fodder, farming utensils, buggies, carriages, light harness and robes therein," all situated on a designated tract of land. If there be any variance between these provisions and the allegations of the complaint, the former must control. *Harrison Bldg., etc., Co. v. Lackey* (1897), 149 Ind. 10, 48 N. E. 254; *Indiana, etc., Assn. v. Plank* (1899), 152 Ind. 197, 52 N. E. 991.

It is evident that the word "therein," as used in the above quotation, refers to appellant's barn and shed located on the designated tract of land,

2. but it does not follow that a recovery cannot be had for a loss by fire of any of the property named unless it occurs while situated in such
3. barn or shed. The greater weight of authority supports the rule that in policies upon personal property which, from its character and ordinary use, is kept continuously in one place, as a stock of merchandise, machinery in a building, household furniture or goods stored, the location of the property designated in the policy is an essential element of the risk and usually a continuing warranty. In such cases the policies cover the goods only so long as they remain in the designated place, and if they are destroyed elsewhere the insurer is not liable for the loss. But where the insured property is of such a character that its temporary removal or absence from the specified place is necessarily incident to its use and enjoyment, such use will be presumed to have

Lesh v. Rockcreek, etc., Ins. Co.—68 Ind. App. 301.

been in the contemplation of the parties when they made the contract of insurance, unless the language thereof precludes such presumption. In such cases the location of the property is specified in the policy merely to designate its accustomed place of deposit when not temporarily absent therefrom in the course of its ordinary use, and, if the property be burned when so absent, the insurer is liable for its loss. *Noyes v. Northwestern, etc., Ins. Co.* (1885), 64 Wis. 415, 25 N. W. 419, 54 Am. Rep. 631; *Kinney v. Insurance Society* (1913), 159 Ia. 490, 141 N. W. 706, Ann. Cas. 1915A 609; *Holbrook v. St. Paul, etc., Ins. Co.* (1878), 25 Minn. 229; *Longueville v. Western Assurance Co.* (1879), 51 Ia. 553, 2 N. W. 394, 33 Am. Rep. 146; *McCluer v. Girard, etc., Ins. Co.* (1876), 43 Ia. 349, 22 Am. Rep. 249; *Reck v. Hatboro, etc., Ins. Co.* (1894), 163 Pa. St. 443, 30 Atl. 205; *Peterson v. Mississippi, etc., Ins. Co.* (1868), 24 Ia. 494, 95 Am. Dec. 748; *Everett v. Continental Ins. Co.* (1874), 21 Minn. 76; *Benton v. Farmers, etc., Ins. Co.* (1894), 102 Mich. 281, 60 N. W. 691, 26 L. R. A. 237, and note; *Lathers v. Mutual, etc., Ins. Co.* (1908), 135 Wis. 431, 116 N. W. 1, 22 L. R. A. (N. S.) 848, and note, 15 Ann. Cas. 659; *Joplin v. National, etc., Ins. Assn.* (1912), 61 Ore. 544, 122 Pac. 897, 44 L. R. A. (N. S.), note on page 574; 14 R. C. L. 955; Vance, Insurance 439 *et seq.* In the instant case the farming utensils, buggies, carriages, light harness and robes mentioned in that part of the policy quoted above are of the latter character, and there is nothing in the contract of insurance to exclude the presumption that the parties contemplated that it should be removed temporarily from such barn or shed in its ordinary use. Under these cir-

cumstances, the fact that any of the property last mentioned covered by the policy in suit was away from the designated barn or shed when it was destroyed, would not necessarily preclude a recovery.

However, appellant has failed to allege facts that bring him within the provisions of the rule stated.

There are no allegations in the complaint

4. that the property in question was in the barn or shed at the time the policy was issued or at any time prior or subsequently thereto. It is not alleged that said barn or shed was the usual and accustomed place of keeping the property, or that it had been taken therefrom in its ordinary use and moved temporarily to the farm where it was destroyed, and there are no facts alleged from which such an inference can be properly drawn. The complaint on the other hand expressly alleges that it was appellant's custom to keep such property on the farm and in the buildings where it was destroyed, as the officers of appellee well knew. Under these facts there is a failure to show that the property alleged to have been destroyed was included in or covered by the policy in suit.

Appellant has alleged certain facts in his amended complaint on which he attempts to base a waiver of the restrictive clause in the policy with reference to the location of the personal property covered thereby. Some of these facts, if not all, would be pertinent if it were shown that the policy in suit had covered the property in question and that a breach of warranty was involved, but in a case like this, where the facts alleged fail to show that the property destroyed was covered by the policy sued on, the principle of waiver has no application. *Knights, etc., Ins.*

Mobley v. J. S. Rogers Co.—68 Ind. App. 308.

Order v. Shoaf (1906); 166 Ind. 367, 77 N. E. 738.

It follows that the court did not err in sustaining the demurrer to appellant's amended complaint. Judgment affirmed.

NOTE.—Reported in 120 N. E. 391. See under (2, 3) 19 Cyc 740, 741.

MOBLEY v. J. S. ROGERS COMPANY.

[No. 10,205. Filed May 2, 1918. Rehearing denied October 10, 1918.]

1. CONTRACTS.—*Construction.—Ambiguity.*—Where a contract is uncertain or ambiguous resort may be had to extraneous facts and circumstances, as well as to the practical construction given to the contract by the parties. p. 312.
2. CONTRACTS.—*Construction.—Extrinsic Evidence.—Questions of Law and Fact.*—Where extraneous facts and circumstances are resorted to for the purpose of explaining an ambiguous contract, the question of construction becomes one of mixed law and fact. p. 312.
3. MASTER AND SERVANT.—*Workmen's Compensation.—Findings of Industrial Board.—Construction of Contracts.*—Where the construction of a contract, upon which depended the relation of master and servant, was a mixed question of law and fact for the determination of the Industrial Board, the conclusion of the board, if supported by some evidence, is binding on appeal. p. 312.
4. EVIDENCE.—*Parol.—Extraneous Circumstances.—Contracts.*—In a proceeding under the Workmen's Compensation Act (Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918), provisions in a contract, upon which depended the question whether the injured applicant was an employe, that the applicant was a subcontractor for construction of the stonework for a government building according to plans prepared by the supervising architect of the treasury department and under his direction, the defendant's only interest being to see that the work was done as planned and to pay the agreed price, was not so ambiguous as to warrant a resort to extraneous circumstances by the Industrial Board. p. 312.
5. MASTER AND SERVANT.—*Workmen's Compensation.—Employes and Subcontractors.*—Where a person, under the terms of a contract, was designated a subcontractor for the construction of

Mobley v. J. S. Rogers Co.—68 Ind. App. 308.

stonework for a government building, was to furnish his own tools, equipment and laborers, and was to be wholly independent of the general contractor, except that the latter and the architect were to see that proper results were accomplished, the relation created was that of subcontractor and contractor and not that of employer and employe; and this is true, though such person was injured while underdressing a stone according to marks made thereon by the superintendent of the original contractor, the pay for such work being fixed at a certain rate per hour, not as wages, but as the agreed price under the contract. p. 313.

From the Industrial Board.

Proceedings by Jacob A. Mobley, under the Workmen's Compensation Act against the J. S. Rogers Company. An award by one member of the board was reversed by the full board, and the applicant appeals. *Affirmed.*

Charles E. Henderson and *James L. Murray*, for appellant.

L. K. Babcock and *Forkner & Forkner*, for appellee.

IBACH, C. J.—Appellant, while engaged in cutting stone for use in the government post office building then being constructed at Newcastle, Indiana, received an injury, which resulted in the loss of the sight of one eye. He immediately made application for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, and upon a hearing before one member of the Industrial Board was allowed compensation, but upon a review before the full board such award was reversed and compensation denied.

The controlling question presented by the appeal to this court is, Was appellant an employe of appellee, or was he an independent contractor or a subcontractor? Unless he was an employe, no compensation can be recovered under the statute.

The evidence discloses that appellee was the general contractor for the construction of the government building referred to. Appellant was also a contractor, engaged in cutting and fitting stone in buildings of that nature, and had in his employ eight or more men, who were under his control and supervision, and were paid by him a wage agreed upon between themselves.

The agreement with appellee under which appellant was working when injured was in writing and is set out in full in the briefs. We have extracted the portions pertinent to the question confronting us. It begins:

“The Builders Uniform Subcontract * * * Paragraph 1. This agreement made the first day of May, 1916, between J. A. Mobley * * * parties of the first part hereafter designated the *subcontractor* and J. S. Rogers Co. * * * party of the second part, hereinafter designated the contractor.”

Then follows:

“The subcontractor * * * agrees with the contractor as follows: Article 1. The subcontractor shall and will provide all labor and equipment for the erection of all limestone and granite used in the United States Post Office building in New Castle, Ind. * * *”

Article 2 provides that the work shall be done under the direction of the architect and in conformity to certain specified drawings and specifications. Article 4 reads:

“The subcontractor shall provide * * * facilities for inspection by the contractor * * *

and he shall remove after notice all materials condemned by the architect.”

Article 5 provides for the furnishing of a sufficient number of skilled workmen by the subcontractor, and, in case of default on his part in this regard, the contractor has the right to employ such labor, and all damages occasioned by such default shall be charged to the subcontractor; and in the subsequent paragraph it is provided that the subcontractor shall complete his work so as not to delay the building. Article 7 makes provision for the payment of damages to the subcontractor by the contractor, and by the subcontractor to the contractor, if any is occasioned by delay in furnishing material on the part of the one party and for delay in the prosecution of the work on the part of the other. Article 9 provides the sum to be paid by the contractor for said work and material shall be at the rate of “22 cents per cubic foot measured in the building. * * * Patching and cutting made necessary by faults of others than the subcontractor to be paid for at the rate of 75 cents per hour * * * that such sums shall be paid by the contractor to the subcontractor in current funds as follows:” Article 11 provides for the contractor taking out fire insurance as the building progresses to be paid to the parties as their interest may appear. There is a further provision to the effect that the subcontractor was to indemnify the contractor against all claims for damages arising from accident to persons or property occasioned by the subcontractor and his employes, and likewise a provision that the contractor was to indemnify the subcontractor against claims of like character occasioned by the contractor and its employes.

It appears also from the evidence that a certain stone was delivered from the quarry, which was not perfectly dressed, and before it could be used in the building it became necessary to "underdress" it. The cutting required was marked by appellee's superintendent. Appellant attempted to do this particular work of cutting the stone where marked, and, while so engaged, a piece of stone, or a particle from his chisel, flew off and struck his eye, injuring it.

While it is true, as contended by appellant, that, where a contract is uncertain or ambiguous in its terms, resort may be had to extraneous facts

1. and circumstances, as well as the practical construction, if any, given to the contract by the parties in arriving at the true agreement, as a
2. corollary to such rule, when such facts and circumstances are resorted to, they, together with the inferences to be drawn therefrom, must be
3. considered in arriving at the true meaning of the contract, and its construction becomes a question of mixed law and the fact for the determination, in this case, by the Industrial Board, and its conclusion in the presence of some evidence is binding on this court. Acts 1915 p. 392, §61; *Kirkoff Bros. v. McCool* (1917), 64 Ind. App. 645, 116 N. E. 439. So that if this case involved a state of facts which required the application of this rule, we would be bound by the action of the Industrial Board.

As shown by the extracts from the contract above set out, there is no uncertainty in any of the terms and provisions of this contract affecting the

4. relations of the parties. Appellant is therein designated as a *subcontractor*. He therein agreed to do the work he contracted to do according

to certain plans and specifications prepared by the *supervising architect of the treasury department* and under the direction of said architect, so that as to appellant's particular work appellee had nothing whatever to do, except to see that such work was done to the satisfaction of such architect, and to pay appellant the agreed price.

By the terms of his contract appellant was to furnish all his own tools and equipment, all necessary laborers, and was to act wholly independent of

5. appellee in the performance of his contract. In fact, appellant was his own free agent, under the control of no one except the architect and original contractor, and then only to the extent that proper results were accomplished. The marking of the stone by the superintendent, to which fact appellant attributes much importance, was simply an indication where the cutting had to be done in order that that particular stone might conform to the specifications and fit in the proper place. The contract with reference to this particular kind of work provides that patching and cutting made necessary by the fault of others than the *subcontractor* was to be paid for at the rate of seventy-five cents per hour, clearly indicating that the contract was intended not only to cover the work of placing the stone in the building as the separate blocks were delivered on the premises ready to be set, but that, when it became necessary to redress or underdress any of them by reason of breakage or error, such work was also to be done by appellant, and the rate of compensation was fixed as above indicated, not as wages as an employe but as pay for the performance of work covered by the terms of the contract, the extent thereof depending

Rinelli v. Rubino—68 Ind. App. 314.

on the condition of each particular stone as it was about to be placed in position, and this work was as much a part of the contract as the work of setting the stone which were received ready to be set in the building without any alteration or change. *Indiana Iron Co. v. Cray* (1898), 19 Ind. App. 565, 581, 583, 48 N. E. 803.

The contention by appellant that the parties themselves placed a construction on the contract which must bind them now, and the authorities cited on the proposition that parties may mutually adopt a construction of a written contract which, when mutually acted upon, may become binding, has no application to the facts of this case, as the record is silent upon any acts or conduct on the part of appellee or any one authorized to act for it which warrants its application.

Award affirmed.

NOTE.—Reported in 119 N. E. 477. Workmen's compensation acts: employers, employees and employments to which the acts apply, L. R. A. 1916A 113, 245, 1917D 143.

RINELLI v. RUBINO ET AL.

[No. 9,642. Filed October 11, 1918.]

1. SALES.—*Merchantability*.—The general rule is that where goods are sold by description and the buyer has had no opportunity for inspection, the goods must not only, in fact, answer the description but must also be salable or merchantable under such description. p. 317.
2. SALES.—*Implied Warranty*.—*Merchantability*.—In the sale of perishable goods, such as apples, there is no implied warranty that they will continue sound or merchantable for a definite period or for any period after delivery. p. 317.

Rinelli v. Rubino—68 Ind. App. 314.

3. *APPEAL.—Misleading Instruction.—Reversible Error.*—Where, in a suit for recovery of the purchase price of a carload of apples, the issue was merchantability at the place of shipment, it was reversible error to instruct in effect that, if the apples were not fit for use in the market, there was a breach of the contract of implied warranty, since the language tended to confuse the jury as to the place of merchantability. p. 318.

From Clinton Circuit Court; *Joseph Combs*, Judge.

Action by Samuel Rinelli against Tony Rubino and another. From a judgment for the defendant, the plaintiff appeals. *Reversed.*

Russell P. Harker, and *Earl & Earl*, for appellant.
Guenther, Clark & Van Brunt, for appellee.

IBACH, J.—The appellant sued appellees to recover the purchase price of a carload of apples. The complaint is in two paragraphs, the sufficiency of which was not questioned in the trial court. The first paragraph is in the form of a common count, while the second proceeds upon the theory that appellant sold and delivered a carload of apples to appellees under a contract substantially as follows: That the plaintiff should sell to the defendants one carload of about 150 barrels of A-grade Baldwin apples; that said apples should average $2\frac{1}{2}$ inches in diameter and should be good color and sound; that plaintiff should deliver said apples to the defendants on board cars at Lockport, N. Y., consigned to defendants at Frankfort, Indiana, routed over the Lake Erie and Western Railroad, and that defendants should pay for the said apples the sum of \$2.75 per barrel. It is alleged that appellant complied with his part of the contract, and that appellees refused to pay for the apples.

To this complaint appellees answered by general denial, and also filed a counterclaim in two para-

graphs, in which they set out the contract substantially as alleged in the complaint, and further allege that plaintiff in filling said order impliedly agreed and warranted that the apples would be as ordered and would be A-grade Baldwin, 2½ inches in size and would be of good color and sound; that, knowing the use of defendants for the apples, plaintiff impliedly agreed and warranted that they would be reasonably fit for such use and for resale by defendants upon their arrival and within a reasonable time thereafter; that when the apples were received at Frankfort they were rotten and worthless.

Appellant answered the counterclaim by a general denial and by an affirmative answer, in which he alleges in substance that the contract was entered into by means of telegrams, copies of which are set out, and that they constituted an express contract by which appellant agreed to furnish apples as described in the complaint at the time of delivery; that he did not either expressly or impliedly agree that the said apples should be fit or suitable for any particular purpose or that they should remain sound and of good color for any stipulated length of time; that by the terms of the contract the apples were sold by appellant to appellees on board cars at Lockport, N. Y., and that said contract was to be and was completely performed by appellant when the apples were delivered to the carrier at Lockport.

Upon the issues thus joined a trial was had by jury and a verdict returned for appellees. Over appellant's motion for a new trial, judgment was rendered on the verdict.

The only error assigned is the overruling of the motion for a new trial, which calls in question the

court's rulings on certain instructions and the sufficiency of the evidence to sustain the verdict.

Instruction No. 6 given by the court of its own motion told the jury that "the plaintiff was bound to know that the apples in question were purchased of him by the defendants for sale and use by their retail customers in their regular trade and that the plaintiff would be held to an implied warranty that the said apples would be reasonably fit for the purpose for which the defendants purchased them," and, if they found from the evidence "that the apples furnished by the plaintiff to the defendants under the contract sued on were not reasonably fit for the use in the market, that there was a breach of the said contract of implied warranty," etc.

The general rule seems to be that where goods are sold by description and the buyer has not had an opportunity of inspecting the goods, they must

1. not only, in fact, answer the description but must also be salable or merchantable under that description. *Oil-Well Supply Co. v. Watson* (1907), 168 Ind. 603, 610, 80 N. E. 157, 15 L. R. A. (N. S.) 868; *Chicago, etc., Provision Co. v. Tilton* (1877), 87 Ill. 547; *McClung v. Kelley* (1866), 21 Iowa 508; *Warner v. Arctic Ice Co.* (1883), 74 Me. 475; *Baer v. Mobile Cooperage, etc., Co.* (1909), 159 Ala. 491, 49 South. 92; *Bierman v. City Mills Co.* (1897), 151 N. Y. 482, 45 N. E. 856, 37 L. R. A. 799, 56 Am. St. 635.

The question then arises, At what time and place should the inquiry as to merchantability be directed?

Manifestly, under the contract in suit, it should

2. be directed to the time and place of delivery to the carrier, and the court should have in-

structed the jury clearly on this point. Apples are perishable goods. In the sale of perishable property there is no implied warranty that it will continue sound or merchantable for a definite period, or for any period after delivery. *Mann v. Everston* (1869), 32 Ind. 355; *English v. Spokane Com. Co.* (1893), 57 Fed. 451, 453; *Rhynas v. Keck* (1917), 179 Iowa 422, 161 N. W. 486, and cases cited; *Ryan v. Ulmer* (1885), 108 Pa. St. 332, 335, 56 Am. Rep. 210; *Williams, etc., Co. v. Marshburn* (1914), 15 Ga. App. 614, 84 S. E. 90; *Barnes v. Waugh* (1901), 41 N. S. 38; 35 Cyc 399, 415.

The effect of the instruction was to confuse the minds of the jury on merchantability at the place of shipment, which is the question in the case,

3. with merchantability at place of destination.

It was therefore misleading and improper, and its giving constituted reversible error.

Other questions are discussed, but, as some of them relate to the sufficiency of the evidence and others to questions not likely to arise in another trial, their discussion here would be of no material benefit.

Judgment reversed, with instructions to sustain appellant's motion for a new trial, and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 120 N. E. 388. Sales: by description, implied warranty where purchaser has no opportunity to inspect, 14 L. R. A. 492, 35 L. R. A. (N. S.) 271. See under (1, 2) 35 Cyc 397, 399.

Union School Tp., etc. v. Brown—68 Ind. App. 319.

UNION SCHOOL TOWNSHIP OF JASPER COUNTY v. BROWN.

[No. 10,239. Filed October 16, 1918.]

APPEAL.—Dismissal.—Briefs.—The appellant's failure to file briefs within the time granted, on his petition for an extension of time, requires a dismissal of the appeal.

From Jasper Circuit Court; *Charles W. Hanley*, Judge.

Action between Union School Township of Jasper county and Merton V. Brown. From a judgment for the latter, the township appeals. *Appeal dismissed.*

George A. Williams and *D. D. Dean*, for appellant.
E. M. LaRue and *John A. Dunlap*, for appellee.

IBACH, J.—Appellee has filed a motion to dismiss this appeal on the ground that the sureties on the appeal bond, which was filed on December 31, 1917, were not named by the court at the term in which final judgment was rendered, and that such bond has not at any subsequent term been approved by the court.

After the filing of appellee's motion the appellant applied for, and was granted, an extension of time in which to file its brief, to and including August 1, 1918. No further extension of time was requested, and appellant's briefs are not on file. Under such condition of the record, a consideration of appellee's motion is rendered unnecessary, as in any event the cause would have to be dismissed.

Appeal dismissed.

NOTE.—Reported in 120 N. E. 393.

BUCKEL ET AL. v. AUER ET AL.

[No. 9,648. Filed October 17, 1918.]

1. **APPEAL.—Review.—Ruling on Demurrer to Answer.**—Where judgment was rendered against the plaintiff on his refusal to plead further after his demurrers to paragraphs of answer were overruled, the judgment must be affirmed on appeal if one sufficient paragraph of answer was addressed to each paragraph of complaint, even though the ruling were erroneous as to other paragraphs. p. 324.
2. **ESTOPPEL.—Quitclaim Deed.**—Though the general rule is that a quitclaim deed does not estop the grantor from ascertaining an after-acquired interest in the lands therein described, a recital in a deed without covenants, in substance, that the grantor thereby intends to convey an interest specifically described and identified may be effective, through the principle of estoppel, to convey an after-acquired interest. p. 325.
3. **ESTOPPEL.—Quitclaim Deed of Husband.—Interest Conveyed.**—A quitclaim deed executed by a husband alone which failed to point out specifically the estate or interest intended to be conveyed was not effective to convey, as an after-acquired interest, the estate acquired in his wife's realty upon her death. p. 326.
4. **HUSBAND AND WIFE.—Separate Estate.**—The husband's interest in the wife's lands during her lifetime is of the same character as the wife's interest in the husband's lands during his lifetime. p. 326.
5. **HUSBAND AND WIFE.—Conveyances.**—The interest that a wife has in her husband's lands while he is yet living is of such an intangible nature that it cannot be conveyed either by her deed or by the joint deed of herself and husband, the latter retaining his interest in the lands. p. 326.
6. **HUSBAND AND WIFE.—Husband's Creditors.**—The husband's inchoate interest in his wife's lands while she is living is so unsubstantial that it may not be reached or affected by his creditors. p. 327.
7. **HUSBAND AND WIFE.—Separate Estate.**—In view of §3952 Burns 1914, §2921 R. S. 1881, the inchoate interest of the husband in the wife's lands cannot be separately conveyed. p. 327.
8. **LIMITATION OF ACTIONS.—Existence of Trust.**—The rule that the statute of limitations may not be pleaded in bar of a suit to enforce a trust where it appears that the trust is direct and con-

 Buckel v. Auer—68 Ind. App. 320.

tinuing, is limited in its application to trusts that are subsisting, recognized and acknowledged. p. 327.

9. **LIMITATION OF ACTIONS.—To Enforce Subsisting Trust.—Repudiation of Trust.—Effect.**—The rule that the statute of limitations may not be pleaded in bar of a suit to enforce a subsisting, recognized and acknowledged trust is qualified by the rule that where the trustee, with knowledge of the *cestui que trust*, openly disavows and repudiates the trust, the statute begins to run. p. 327.
10. **TRUSTS.—Disavowal.—Proof.**—The fact that a trust has been openly disavowed and repudiated by the trustee, with knowledge of the *cestui que trust*, may be proved by circumstances. p. 327.
11. **LIMITATION OF ACTIONS.—Quieting Title by Establishing Trust.**—An action to quiet title to lands, by establishing a trust therein, is governed by the fifteen years' statute of limitations. p. 328.
12. **LIMITATION OF ACTIONS.—Quieting Title.—Possession as Factor.**—A person in possession of real estate may quiet his title against a hostile, unfounded claim asserted at any time within fifteen years; and if out of possession, he may maintain an action to quiet title against any such claim asserted within fifteen years, provided his right to recover possession is not barred by the twenty years' statute of limitation, §295, cl. 6, Burns 1914, §293 R. S. 1881. p. 328.
13. **WILLS.—Ratification.—Acceptance of Benefits.**—The acceptance of benefits under a will amounts to a ratification of the will in all its parts, and the person so accepting must bear the burdens thereby imposed. p. 329.

From Elkhart Circuit Court; *James S. Drake*, Judge.

Action by Mary Buckel and others against Rupert Auer and others. From a judgment for defendants, the plaintiffs appeal. *Affirmed.*

McInernys, Yeagley & McVicker and *J. Elmer Peak*, for appellants.

Samuel Parker, Will G. Crabill and *S. J. Crum-packer*, for appellees.

CALDWELL, C. J.—Judgment was rendered against appellants by reason of their election not to plead further on the overruling of their demurrers filed to the

second, sixth, seventh, eighth, ninth, tenth and eleventh paragraphs of answer. These rulings are assigned as error.

Appellants are heirs at law of Creszentia Auer, deceased, appellants Mary Buckel, Frances Peak, Amelia Toepp and Joseph C. Lauber being children of her first marriage, and the other appellants George Lauber, Jr., and Amanda Lauber being children of her deceased son, George Lauber, who died before her decease.

Appellees other than DuShane, administrator, are collateral kindred and heirs at law of Charles Auer, who was Creszentia Auer's second husband. Creszentia Auer died in 1891. Charles Auer died in 1913. Appellee DuShane is administrator of his estate.

The complaint was in three paragraphs, each of which was lengthy. For purposes of the consideration of the substantial questions presented by the briefs, the first and third paragraphs were to the effect that at the time of the decease of Creszentia Auer she held in her own name the record title to a number of tracts and lots of land situate in St. Joseph county, Indiana; that, while the record title to such lands stood in her name, she in fact held such lands in trust and as trustee in trust for appellants; that such trust in lands arose from the averred fact that a number of years before her decease, Creszentia purchased such lands with money which she held by implied trust for appellants, taking title in her own name.

The second paragraph of complaint differed from the first and third in the following respects: It described as purchased and held in trust a single rather than a number of tracts of land. It alleged that

such tract was purchased by, and conveyed to, Creszentia Auer on January 12, 1872, and that immediately thereafter Charles Auer executed his quitclaim deed, his wife Creszentia not joining, by which he quitclaimed such tract to appellants. Such deed contained no covenants and described as quitclaimed no specific interest in such tract. Both the complaint and the deed made a part of it, were silent respecting the purpose for which the deed was executed.

It was not averred in any paragraph of complaint that Creszentia held the described lands, or the money with which it was alleged that the purchase was made, under a direct or express trust. No paragraph of complaint classified the alleged trust as express or implied, direct, resulting, or constructive. Appellants in their brief state that from the facts averred a resulting trust arose. The complaint contained no averment of fraud, bad faith or concealment. By the complaint appellants sought to quiet their title to the lands described in the respective paragraphs of complaint against appellees' alleged claim to the one-third thereof, it being alleged in effect that appellees claim that on the decease of Creszentia such one-third descended to Charles Auer as surviving husband and from him to them as heirs at law.

The sixth and seventh paragraphs of answer were directed to the first paragraph of complaint, the eighth and ninth to the second paragraph, and the tenth and eleventh to the third paragraph. In their relation to questions presented and controverted by the briefs, each of these paragraphs, although differing from the others somewhat in phraseology, was to the effect that Creszentia Auer more than twenty years before the bringing of this action, appellants

having full knowledge of the fact at the time, revoked and repudiated the trust and trust relation averred in the respective paragraphs of complaint, and that she by her last will and testament disposed of the involved property as her own and unaffected by any trust. There were allegations also to the effect that Charles Auer and his representatives held the lands and interests in lands in controversy here adversely for more than twenty years after the decease of Crescentia and up to the time of the commencement of this action. Certain of these paragraphs disclosed also that Charles Auer's claim to the land interests involved here was based on an election to take under the statutes of descent rather than under his wife's will. The sixth, eighth and tenth paragraphs of answer contained formal allegations invoking the fifteen years' statute of limitations, and the seventh, ninth and eleventh the twenty years' statute.

If to each paragraph of complaint one sufficient paragraph of answer was addressed, the judgment is thereby sufficiently supported and must be

1. affirmed. In such a case the question of the correctness of the court's rulings on the demurrers filed to the other paragraphs does not involve reversible error. *Williams v. Wood* (1915), 60 Ind. App. 69, 107 N. E. 683, and cases; *Hayward v. Hayward, Admr.* (1917), 65 Ind. App. 440, 115 N. E. 966, 116 N. E. 746. That is to say, if the court's rulings on the demurrers filed to the sixth, eighth and tenth paragraphs of answer were correct, the judgment must be affirmed, even though the rulings on the demurrers filed to the seventh, ninth and eleventh paragraphs were erroneous, and *vice versa*. It results that if either the twenty or the fifteen years'

statute of limitations is applicable here, and is well pleaded, the judgment must be affirmed.

We first direct our attention to the element of the second paragraph of complaint to the effect that Charles Auer, on January 12, 1872, quitclaimed to appellants the lands in such paragraph of complaint described. It will be remembered that such deed did not purport to release to appellants any particular or specific interest in the lands described. There was no reference to any interest in the lands that might ripen into a present estate on the death of Charles Auer's wife. The language of the deed was general; simply that Charles Auer quitclaimed to appellants the involved lands, describing them. The wife, as we have said, did not join in the execution of the deed.

The general rule is that a quitclaim deed does not estop the person executing it from asserting an after-acquired interest in the lands therein de-

2. scribed. *Haskett v. Maxey* (1893), 134 Ind. 182, 33 N. E. 358, 19 L. R. A. 379; *Bryan v. Uland* (1885), 101 Ind. 477, 1 N. E. 52; *Graham v. Graham* (1876), 55 Ind. 23. However, a recital in a deed without covenants, in substance, that the grantor thereby intends to convey an interest specifically described and identified may be effective, through the principle of estoppel, to convey an after-acquired interest. *McAdams v. Bailey* (1907), 169 Ind. 518, 82 N. E. 1057, 13 L. R. A. (N. S.) 1003, 124 Am. St. 240; *Hight v. Carr* (1916), 185 Ind. 39, 112 N. E. 881; *Mosier v. Carter* (1911), 84 Kan. 361, 114 Pac. 226, 35 L. R. A. (N. S.) 1182, note.

Viewing Charles Auer's interest in his wife's real estate as an interest inherited from her at her

decease, and consequently as acquired subsequently to the execution of the quitclaim deed, such deed under the foregoing principles and authorities was not effective to convey it, since such deed was general in its nature, there being no recital pointing out specifically the estate or interest intended to be conveyed.

Appellants argue, however, that a husband's interest in his wife's real estate during her life is similar to a wife's interest in her husband's real estate during his life, and that in each case, while such interest is inchoate, yet that it is sufficiently substantial to be conveyed by a quitclaim deed, although not specifically mentioned therein, and that when so conveyed such interest ripens into title in the grantee to such deed where the grantor survives his spouse.

Appellants are correct in their contention that the husband's interest in the wife's lands during her lifetime is of the same character as the wife's interest in the husband's lands during his lifetime. *Huffman v. Copeland* (1894), 139 Ind. 221, 229, 38 N. E. 861.

However, the interest that a wife has in her husband's lands while he is yet living is of such an intangible nature as that it cannot be conveyed either by her deed or by the joint deed of herself and husband, the latter retaining his interest in the lands. *McCormick v. Hunter* (1875), 50 Ind. 186; *Davenport v. Gwilliams* (1892), 133 Ind. 142, 31 N. E. 790, 22 L. R. A. 244; *Rupe v. Hadley* (1888), 113 Ind. 416, 16 N. E. 391; *Hudson v. Evans* (1882), 81 Ind. 596; *Paulus v. Latta* (1883), 93 Ind. 34.

The husband's inchoate interest in his wife's lands

- while she is living is so unsubstantial that it
 6. may not be reached or affected by his creditors.

Huffman v. Copeland, supra.

Such interest cannot be separately conveyed.
Unger v. Mellinger (1906), 37 Ind. App. 639, 77 N. E.

814, 117 Am. St. 348. The statutory provision

7. is that the wife's lands may be conveyed by
 the joint deed of the husband and wife. §3952
Burns 1914, §2921 R. S. 1881. We hold that the second
 paragraph of complaint embodying Charles
 Auer's quitclaim deed with general, rather than specific,
 provisions does not disclose that Charles Auer
 by such deed conveyed to appellants the interest and
 estate in lands by such paragraph described.

Each paragraph of complaint alleged that Creszen-
 tia Auer held the described lands in trust for appel-
 lants. On no other theory do they seek to

8. recover. The general rule is that the statute
 of limitations cannot be pleaded successfully
 in bar of a suit to enforce a trust where it
 9. appears that the trust is direct and continuing.

Stanley's Estate v. Pence (1903), 160 Ind. 636,
 66 N. E. 51, 67 N. E. 441. This rule is limited in its
 application to those trusts that are subsisting, recog-
 nized and acknowledged. *Wood, Limitations* (4th ed.)
 §200. It does not clearly appear from any paragraph
 of complaint that the trust declared on and sought
 to be enforced is of the nature above indicated, but
 so treating it, there is a well-recognized qualification
 of the rule to the effect that where the trustee,
 10. with the knowledge of the *cestui que trust*,
 openly disavows and repudiates the trust, the
 statute begins to run. *Hitchcock v. Cosper* (1904),
 164 Ind. 633, 73 N. E. 264; 17 R. C. L. 710.

The fact of such a disavowal may be proved by circumstances. *Scott v. Dilley* (1913), 53 Ind. App. 100, 101 N. E. 313.

It appeared from each of the paragraphs of answer now under consideration that more than twenty years before the beginning of the action, Creszentia Auer openly repudiated the alleged trust, and that by her last will and testament she disposed of the involved lands as her own, and that appellants had knowledge of the fact at the time. It results that, for purposes of this case, it must be taken as true that appellants' cause of action accrued and the statute commenced to run against it more than twenty years before the commencement of the action. Appellants here contend merely that the statute of limitations does not run against such a trust as is outlined by the complaint.

As determined by the briefs, there is no controversy between the parties respecting whether the twenty years' statute rather than the fifteen

11. years' statute or *vice versa* is applicable. However, the action is in form to quiet title. It is held that such an action is governed by the fifteen years' statute. *Caress v. Foster* (1878), 62 Ind. 145; *Irey v. Markey* (1892), 132 Ind. 546, 32 N. E. 309; *Detwiler v. Schultheis* (1890), 122 Ind. 155, 23 N. E. 709; *Vanduyne v. Hepner* (1874), 45 Ind. 589.

The courts, in holding that an action to quiet title to lands is governed by the fifteen years' statute, do not always distinguish between cases where the

12. plaintiff is out of possession and cases where he is in possession of the lands involved. Actions to recover the possession of real estate are governed by the twenty years' statute. Subdivision 6,

§295 Burns 1914, §293 R. S. 1881. The true rule seems to be that, where one is in possession of real estate, he may quiet his title against a hostile, unfounded claim asserted at any time within fifteen years. If out of possession, he may maintain an action to quiet title against any such claim asserted within the time aforesaid, provided his right to recover possession is not barred by the twenty years' statute. *Eve v. Louis* (1883), 91 Ind. 457.

Of the answers under consideration there were paragraphs directed to each paragraph of complaint to the effect that Creszentia Auer, more than twenty years before the beginning of the action, repudiated the alleged trust, and that thereafter, and for more than twenty years, Charles Auer and his representatives held the lands involved adversely. These answers were sufficient. It results that the judgment must be affirmed.

While a consideration of the second paragraph of answer directed to each paragraph of the complaint is not necessary to our conclusion, it may be

13. said that such paragraph discloses that Creszentia, by her last will and testament executed and probated in 1891, disposed of all the property involved in this action, together with other property, and that each appellant was a beneficiary thereunder in proportions and estates other than he or she would have taken under the statutes of descent; that each appellant accepted and retained the property devised and bequeathed to him or her thereby. It is a rule of universal application that where one accepts the benefits under a will, he must also bear the burdens thereby imposed; that by accepting such benefits he is thereby held to have ratified the will

Puritan Bed Spring Co. v. Wolfe—68 Ind. App. 330.

in all its parts. Under such circumstances, may appellants be heard to say that a part of the property disposed of by the will was impressed with a trust of which they were beneficiaries? See the following: *State, ex rel. v. Joyce* (1874), 48 Ind. 310; *Young v. Biehl* (1906), 166 Ind. 357, 77 N. E. 406.

Judgment affirmed.

NOTE.—Reported in 120 N. E. 437. See under (2, 3) 16 Cyc 688, 699; (4) 21 Cyc 1411; (5) 19 C. J. 521.

PURITAN BED SPRING COMPANY v. WOLFE.

[No. 10,279. Filed October 18, 1918.]

1. **MASTER AND SERVANT.—*Workmen's Compensation.—Pre-existing Disease.***—Where an employe affected with a disease is injured under such circumstances that the act in question would entitle him to compensation if no disease were involved, and such disease is materially hastened to final culmination by the injury, an award may be had upon a showing that the injury was the result of accident. p. 333.
2. **MASTER AND SERVANT.—*Workmen's Compensation.—Pre-existing Disease.***—Where an employe receives an accidental injury which in itself would entitle him to compensation, and the injury hastens to final culmination a pre-existing disease, the courts will not undertake to measure the degree of disability due respectively to the accident and to the disease, but the consequence will be attributed solely to the accident. p. 333.
3. **MASTER AND SERVANT.—*Workmen's Compensation.—Pre-existing Disease.—Strangulated Hernia.—Proximate Cause.***—Where an employe afflicted with hernia lifted a bale of wire weighing about 150 pounds and thereby caused the intestine to protrude into the existing hernial sac, necessitating an operation to save his life, he was entitled to an award under the Workmen's Compensation Act, and the mere fact that his condition made him more susceptible to the injury resulting in his disability would not warrant a holding that the disease, rather than the "accident," was the proximate cause of the injury. p. 333.

Puritan Bed Spring Co. v. Wolfe—68 Ind. App. 330.

4. MASTER AND SERVANT.—*Workmen's Compensation*.—"Accident."—The word "accident" is used in the Workmen's Compensation Act in its popular meaning, which includes any unlooked for mishap or untoward event not expected or designed. p. 335.
5. MASTER AND SERVANT.—*Workmen's Compensation*.—"Appeal."—*Evidence*.—"Sufficiency."—In a proceeding under the Workmen's Compensation Act for injuries sustained by an employe in lifting a bale of wire weighing about 150 pounds, causing a protrusion of an intestine into an existing hernial sac and producing intestinal strangulation, the evidence is reviewed and held sufficient to sustain an award of the Industrial Board. p. 335.

From the Industrial Board.

Proceeding by Albert Wolfe for compensation under the Workmen's Compensation Act against the Puritan Bed Spring Company. Appellant was granted an award by a single member and, subsequently, by the full board, and the employer appeals. *Affirmed*.

Joseph W. Hutchinson and *Frederick K. Werne*, for appellant.

E. E. McFerren, for appellee.

HOTTEL, J.—On January 28, 1918, appellee filed with the Industrial Board of Indiana an application in the usual form for compensation for injuries alleged to have been sustained by him while in appellant's employ. A hearing on February 8, 1918, by Samuel R. Artman, a member of said board, resulted in an award in favor of appellee. Upon petition by appellant for review, said case was heard by the full board on March 1, 1918, with the result that a finding and award was made by the full board substantially the same as that made by the single member thereof. To this award the appellant excepted, and from it this appeal is prosecuted.

Appellant assigns as error that said award is con-

trary to law. Under this assignment appellant challenges the sufficiency of the facts found to sustain the award and the sufficiency of the evidence to sustain the finding of facts.

The part of said finding pertinent and material to a consideration of these questions is in substance as follows: On November 29, 1917, appellee was in the employment of appellant at an average weekly wage of \$21.60. On that date, while engaged in the discharge of the duties of his employment, appellee lifted a bale of wire, weighing about 150 pounds, to a reel which stood about even with the appellee's shoulders. In lifting the bale of wire appellee severely strained his body, and thereby caused a protrusion of an intestine into *an existing hernial sac or aperture*. By reason of the strain of appellee's body at the time said intestine was impinged or held in said hernial sac, producing an immediate intestinal strangulation. Appellant had actual knowledge of appellee's injury immediately thereafter. On December 15, 1917, appellant executed a report of such injury to the Industrial Board, and delivered the same to its insurance carrier. Appellant did not furnish appellee an attending physician for treatment of his injuries, nor the necessary surgical and hospital services and supplies required thereby. The strangulation aforesaid required an immediate surgical operation in order to save appellee's life. Appellee procured his own surgeon, Dr. Gatch of Indianapolis, to perform said operation, and a reasonable fee for his services in performing the operation and treating appellee following it and treating the first thirty days after the injury is \$60. Appellee procured his own hospital services and supplies and

thereby incurred within the first thirty days after his injury an expense of \$57.14, which he has paid. As a result of his injury the appellee was totally disabled for work continuously from the date thereof until and including January 23, 1918.

It is insisted by appellant in effect that this finding affirmatively shows that appellee's injury was not accidental, or at least fails to show that such injury was accidental. This contention is in the main based on the words of the finding which we have italicized *supra*.

Appellant concedes, and correctly so, that where an employe affected with disease receives a personal injury under such circumstances that the act in

1. question would entitle him to compensation had there been no disease involved, and such disease is materially hastened to a final culmination by the injury, there may be an award, if it is shown that such injury was the result of accident; that in such cases the court will not undertake to measure the degree of disability due respectively to the disease and to the accident, but the consequence of the disease will be attributed solely to the accident. *Indianapolis Abattoir Co. v. Coleman* (1917), 65 Ind. App. 369, 117 N. E. 502, 503; *In re Bowers* (1917), 65 Ind. App. 128, 116 N. E. 842, 843.

It is insisted, however, in effect that these propositions of law cannot avail appellee for the reason that the finding here shows that he was afflicted with

3. a disease or disabling physical condition which rendered him susceptible to the injury for which compensation was awarded, upon exposure to "some slight incident" either within or outside of the employment, and that in such cases the disease

or condition, rather than the accident, will be treated as the cause of the disability. It is argued that the finding of the board that the lifting of the wire caused the intestine to protrude into an "*existing hernial sac or aperture*," affirmatively shows that appellee's condition, rather than the accident, was the proximate cause of the disability for which compensation was allowed, and that the mere fact that the disability occurred during his employment affords no justification for the award.

We think appellant confuses the injury and resulting disability upon which the award is predicated with the condition which made such injury or disability more likely to occur. Both said condition and the injury from which the disability resulted in this case—that is, both the hernial sac or aperture and the protrusion and strangulation of the intestine therein—might have been the result of the accident complained of, in which case we assume that liability for compensation under the act in question would not be disputed. However, under the board's finding, the condition, viz., the existence of the hernial sac, was present before the accident occurred, but the disability upon which the award is predicated resulted from the protrusion of the intestine into the said sac and the resulting intestinal strangulation which necessitated the immediate surgical operation. The board expressly finds that the protruding of the intestine into the hernial sac with the resulting strangulation was caused by the lifting of the bale of wire. This finding we think clearly brings the case within the application of the rules announced in the cases *supra*. See also *Haskell, etc., Car Co. v. Brown* (1917), 67 Ind. App. 178, 117 N. E. 555; *In re*

Bowers, supra; Brightman's Case (1914), 220 Mass. 17, 107 N. E. 527, L. R. A. 1916A 321; *Milwaukee v. Industrial Comm.* (1915), 160 Wis. 238, 151 N. W. 247; *LaVeck v. Parke-Davis Co.* (1916), 190 Mich. 604, 157 N. W. 72, L. R. A. 1916D 1277, and cases cited. Under these authorities, the mere fact that appellee's condition made him more susceptible to the particular injury which resulted in his disability furnishes no ground for holding that the disease or condition, rather than the accident, was the proximate cause of the injury upon which the allowance for disability is based.

We recognize that there is a line of compensation cases in other jurisdictions which give to the word "accident," used in the respective compensa-

4. tion acts, a restricted meaning which in a measure justifies appellant's contention, but the weight of authority and the better reason, we think, favors the adoption of the popular meaning of said word, which includes "any unlooked for mishap or untoward event not expected or designed." This court has given to said word the popular meaning indicated. *Haskell, etc., Car Co. v. Brown, supra; In re Ayers* (1917), 66 Ind. App. 458, 118 N. E. 386; *Robbins v. Original Gas Engine Co.* (1916), 191 Mich. 122, 157 N. W. 437.

As affecting appellant's contention that the finding is not supported by the evidence, we deem it sufficient to say generally that there was evidence

5. to the effect that appellee had been in appellant's employ for a number of years; that in 1914 while in its employ he submitted to a surgical operation for hernia. Immediately or shortly after this operation appellee had a case of typhoid fever,

which it seems prevented the results of said surgical operation from being entirely satisfactory. It appears, however, that he went back to his old job with appellant, and according to his statement he never lost a day, and was not bothered in his work on account of hernia, but that some time in September previous to his accident he saw a lump in his side, and because of his old condition he quit work for about a week, but was not sick. He "saw the lump coming there and took it easy." After laying off he went back to his job with appellant and did the same kind of work he had been doing. On the morning of the accident he went to his work, so far as the evidence shows, in his usual health. During the progress of his work he lifted a bale of wire weighing about 150 pounds up to a reel about even with his shoulders, when he "suddenly became pained and sick and unable to work." He went home and called a doctor, who found his condition to be that indicated in the finding, *supra*. Appellant's witness Dr. Gatch testified in effect that where there is an opening or hernia sac pressure is liable to cause a protrusion; that assuming there was such an opening, and that appellee immediately before the accident lifted a dead weight of 150 pounds to a height of four feet, he would say that it was the pressure from lifting that caused the protrusion; that he would have no doubt about it. The recital of this evidence is sufficient, we think, without comment, to show that it justifies the finding of the board. For other cases supporting this conclusion, see *Sugar Valley Coal Co. v. Drake* (1917), 66 Ind. App. 152, 117 N. E. 937; *Bell v. Hayes-Ionia Co.* (1916), 192 Mich. 90, 158 N. W. 179; *Crowley's Case* (1916), 223 Mass. 288, 111 N. E. 786; *Mad-*

Federal Union Surety Co. v. State, ex rel.—68 Ind. App. 337.

den's Case (1916), 222 Mass. 487, 111 N. E. 379, L. R. A. 1916D 1000; *Mooradjian's Case* (1918), 229 Mass. 521, 118 N. E. 951.

The award of said board is therefore affirmed, with five per cent. added as provided by §3 of the amendment of 1917 to the Workmen's Compensation Act. Acts 1917 p. 154, §3, §8020s2 Burns' Supp. 1918.

NOTE.—Reported in 120 N. E. 417. Workmen's compensation: effect of fact that pre-existing disease contributed to injury or death on right to recover, L. R. A. 1917D 110, 129.

FEDERAL UNION SURETY COMPANY ET AL. v. STATE,
EX REL. POPP, GUARDIAN.

[No. 9,643. Filed October 18, 1918.]

1. **INSANE PERSONS.—Guardian's Report.—Suit to Set Aside.—Pleading Breach.**—A complaint to set aside the final report of the guardian of an insane person, on the ground of the breach of a condition in the guardian's bond, need not allege the exact date of the breach, since the failure of the guardian to account in such report for all funds received is, from the time of the filing thereof, a breach of the bond for which the bondsmen are liable. p. 339.
2. **INSANE PERSONS.—Actions on Guardian's Bond.—Pleading.—Sufficiency.**—In an action on the bond of a guardian of an insane person, a complaint showing his appointment as guardian, the execution of the bond with condition that the guardian should faithfully administer the trust, the amount of money received, the filing of a final report which failed to account for a part of the money, the discharge of the guardian, and the conversion to his own use of the part unaccounted for, sufficiently alleges a breach of the bond as occurring at the time the report was filed. p. 340.
3. **INSANE PERSONS.—Action on Bond.—Sale of Realty.—Liabilities of Sureties on Sale Bond.**—Where the guardian of an insane person had given, in addition to his general bond, a bond for the sale of the ward's realty, and, in the discharge of his trust, he com-

Federal Union Surety Co. v. State, ex rel.—68 Ind. App. 337.

mingled the funds from the sale of the realty with other funds so that they could not be accurately separated, there could be a recovery either from the sureties on the general bond or from those on the bond to sell the realty. p. 341.

From Clark Circuit Court; *James W. Fortune*, Judge.

Action by the State of Indiana, on the relation of Fred Popp, guardian, against the Federal Union Surety Company and others. From a judgment for the plaintiff, the defendants appeal. *Affirmed*.

Burt & Taggart, for appellants.

Burdette C. Lutz, for appellee.

IBACH, J.—On December 28, 1900, Ephriam C. Martin was appointed guardian of the person and estate of Caroline Hoehn, a person of unsound mind, and on that day filed his bond for the faithful performance of his duties as such guardian with George W. Martin, Albert McKinley and Francis M. Brock as sureties. Thereafter, on May 12, 1905, said guardian filed his second general bond of \$1,000 with appellant surety company as surety thereon. He continued to act in the capacity of guardian until September 28, 1908, when he filed his report in the clerk's office of the Clark Circuit Court, and resigned his trust, which report and resignation was duly accepted and he was discharged. On May 12, 1905, he was chargeable with the sum of \$396.36 belonging to his ward, and on October 20, 1907, he had received the further sum of \$300 in cash and a promissory note for a like amount. When Martin was discharged, Mary E. Todd was duly appointed his successor, and he delivered to her the \$300 note and \$308 in money. The court had allowed him \$100.55 for his services and expenses.

This suit was then brought on the two general bonds mentioned to recover the amount of the estate which he had failed to surrender to his successor. The amended complaint is in three paragraphs. By the first it is sought to have the action of the court in approving the final guardian's report set aside. The second went out on demurrer, and the third seeks to recover from the sureties on the second general bond the amount of the alleged shortage. There was a trial by the court, a special finding of facts and conclusions of law, and finally a judgment on the conclusions of law against the appellant Federal Union Surety Company for \$423.75.

The first and second assigned errors are that the court erred in overruling appellants' separate motions to make the first and third paragraphs of the complaint more specific. These motions asked that appellee be required to aver when the breach in the bond in each paragraph of the complaint occurred. It is also assigned as error that the court erred in each of its conclusions of law and in overruling appellants' motion for a new trial.

The first paragraph being a suit to set aside the guardian's final report, it was not essential to allege the exact date when the breach of the bond

1. occurred. The rule in such cases is that, when the guardian files his report and fails to account therein for all funds received by him in that capacity, there is from that time a breach of his bond, for he has thereby failed to faithfully administer his trust and his bondsmen are liable. *Asher v. State*, ex rel. (1882), 88 Ind. 215, 222; *Slauter v. Favorite* (1886), 107 Ind. 291, 298, 4 N. E. 880, 57 Am. Rep. 106.

The third paragraph of the amended complaint con-

tains material averments to the effect that Martin was duly appointed guardian for the insane

2. person, the execution of the bond sued on, conditioned that he would faithfully administer his said trust, also the amount of money received by him after the execution of the bond, the fact of the filing of his final report in which he failed to account for a portion of the money received by him, and his discharge; then there is the concluding averment that he had converted to his own use so much of the estate unaccounted for. These averments are sufficient to show a breach of the bond and that such breach occurred when he filed his final report and was discharged as guardian. *Asher v. State, ex rel., supra; Shook v. State, ex rel.* (1876), 53 Ind. 403. In the case last cited the court said: "We think the allegation that the guardian converted the money * * * shows a breach of the bond."

The last assigned errors will be considered together. In addition to the facts already disclosed, the record shows that in the month of February, 1901, the guardian gave an additional bond to sell real estate, but none was sold, and no funds came into his hands from this source at that time. In April, 1902, he gave an additional bond to sell real estate, and received from such sale the sum of \$300. On May 5, 1903, he filed his current report in which he claimed credits amounting to \$175.24 and a balance on hand of \$396.36. On June 5, 1905, the first general bondsmen were released by the court. On May 12, 1905, after the petition filed by the first general bondsmen to be released from their bond, Martin gave the new bond signed by the appellant surety company, and at that time in the verified report which

Federal Union Surety Co. v. State, ex rel.—68 Ind. App. 337.

he filed, but which was not approved, he stated that he then had on hands \$412.84, of which \$114.74 was cash and the balance was in notes. Again on October 7, 1907, the guardian gave bond to sell real estate with appellant as his surety and, on October 20, he sold real estate for \$600, receiving \$300 in cash and a note for \$300. When he resigned as guardian and was discharged, he delivered to the clerk of the court the \$300 note and \$308.11 in cash and was allowed for services and expenses \$100.55, thereby accounting for \$708.66, instead of \$996.36, as shown by his own verified account and the amounts received from the subsequent sale of the real estate.

The court found, and it sufficiently appears from the record, that Martin had up to May 12, 1905, properly administered his trust, and at that

3. time there had been no breach of his bond, but, if there could be any controversy over this proposition, there is ample evidence that the guardian commingled the different funds received by him while administering his trust so that they could not be accurately separated. Under such circumstances, there could be a recovery from either set of bondsmen. In the case of *Yost v. State, ex rel.* (1881), 80 Ind. 350, 354, the court said: "And if the evidence of accounting failed to show of which fund the guardian was in default, the condition of each bond was broken to the extent of each defalcation, and the plaintiff was entitled to recover the whole sum of whichever set of bondsmen she should choose to sue." This reasoning has been followed in a number of later cases, notably *Asher v. State, ex rel., supra*, and *Moore v. State, ex rel.* (1909), 43 Ind. App. 387, 398, 84 N. E. 161. In view of the facts in this case, there being no dispute over

the amount of the shortage, appellant cannot be harmed because it is surety on both the bond to sell real estate and on the last general bond.

Judgment affirmed.

NOTE.—Reported in 120 N. E. 425. See under (2-4) 22 Cyc 1156, 1157.

CHAMBERLIN v. MYERS ET AL.

[No. 9,635. Filed October 30, 1918.]

1. **LICENSES.—Use of Land.—Revocation.**—A parol license to use the lands of another is revocable at the pleasure of the licensor, on the grounds of equitable estoppel, unless the license has been given for a valuable consideration or money has been expended on the faith that it was to be perpetual or continuous. p. 349.
2. **LICENSES.—Use of Land.—Revocation.**—A license to use the land of another executed by the expenditure of money, or given on a consideration paid, is either irrevocable altogether or cannot be revoked without remuneration. p. 349.
3. **EASEMENTS.—Additional Burdens.—Right of Owner of Dominant Estate.—Additional Servitudes.—Acquiescence.—Estoppel.**—Though the rule is that the owner of a dominant estate cannot subject the servient estate to additional burdens, such rule does not apply where the owner of the dominant estate professes to do so and afterwards becomes the owner of the servient estate, since under such circumstances the doctrine of estoppel by deed applies. p. 350.
4. **ESTOPPEL.—Easements.—Additional Servitudes.—Acquiescence.**—Where an owner of a right of way, by parol agreement, professed to confer on an adjoining owner the right to the use thereof on consideration that the way should be doubled in width by extending it an equal distance into the adjoining owner's land, and the latter, pursuant to the agreement and with the other party's knowledge, made valuable improvements in reliance thereon by the erection of fences and gates, the owner of the former right of way, after purchasing the servient estate, may not assert his after-acquired title to the damage of the adjoining owner and in derogation of the rights assumed to be conveyed by the agreement. p. 351.

Chamberlin v. Myers—68 Ind. App. 342.

5. **EASEMENTS.—*Quieting Title.—Evidence.—Burden of Proof.***—In a suit to quiet title to the use of an easement over land, it is necessary for the plaintiff to show only a license, the payment of a consideration, or the expenditure of money in reliance thereon, to establish a *prima facie* case; the burden is on the defendant to show an effective revocation. p. 351.
6. **EASEMENTS.—*Rights of Owner.—Injunction.***—Where the plaintiffs, under an agreement with the defendant owner of a right of way, had acquired the right to the use of the way in consideration that it be widened by extending it an equal distance into the plaintiff's lands, injunctive relief was properly granted to prevent the defendant from closing the part of the way on his land, the legal remedy in damages not being as practicable, efficient and adequate. p. 352.
7. **EASEMENTS.—*Rights of Owner.—Injunction.—Evidence.—Statu Quo.***—In an injunction suit to prevent obstruction of an easement over another's lands, evidence tending to show that the defendant, the owner of the original right of way, had given the plaintiffs the right to the use thereof in consideration that the way be doubled in width by extending it an equal distance into their lands, that the plaintiffs had carried out the agreement and had constructed fences and gates, pursuant thereto, that if the defendant were permitted to close up the part of the way on his lands, as he would do if not enjoined, the remaining way would be so narrow that ordinary vehicles could not pass or turn from the way through the gates into their lands, was sufficient to show that the closing up of such part of the way would not leave the plaintiffs in *statu quo*. p. 353.

From Hamilton Circuit Court; *Ernest E. Cloe*, Judge.

Action by Sarah C. Myers and others against Lewis Chamberlin. From a judgment for the plaintiffs, the defendants appeal. *Affirmed*.

Christian & Christian and *Ralph H. Waltz*, for appellant.

Shirts & Fertig, for appellees.

BATMAN, J.—This is an action brought by appellees against appellant to quiet their title to the free use and enjoyment of a certain right of way as a per-

petual means of ingress and egress to and from their lands, and to enjoin appellant from closing the same and from interfering therewith. The cause was tried on issues formed by a complaint in two paragraphs, answered by a general denial. Upon request the court made a special finding of facts, which is substantially as follows: In the year 1900 and prior thereto Michael C. Myers was the owner of the west half of the southwest quarter of section 24, township 20 north, range 3 east, in Hamilton county, Indiana. One Job Pickett was the owner of the northeast quarter of the southeast quarter of section 23, in said township and range, and one Levi Burris was the owner of the southeast quarter of the southeast quarter of said section 23, except that the said Burris had granted to said Pickett a right of way eleven feet wide off of the east side of said southeast quarter of said southeast quarter, as a way of ingress and egress to and from said northeast quarter of said southeast quarter, to the highway running east and west along the south line of said sections 23 and 24, which was the only highway touching any of said lands. Prior to the granting of the right of way the lands owned by Burris and the lands owned by Myers were separated by a partition fence constructed of rails, the south half of which belonged to Burris and the north half to Myers. When said Burris granted the right of way to said Pickett, he moved his half of the fence eleven feet to the west, and a like fence was constructed northward on the west line of the right of way to the lands of said Pickett. Said Myers built a fence on that part of the line from which the fence was removed by Burris, so that the right of way was inclosed by a rail fence on each side throughout the

entire length thereof. Said way was of the width of ten or eleven feet, with a gate at the north end opening into the lands of Pickett, and was used by him and by those having occasion to go to and from his premises and by no other persons, said Myers having been forbidden to use the same by said Burris. The buildings on the lands of Myers were located at the north end of the right of way, and near the southwest corner of the north half of his lands. Said Myers died, and plaintiffs became the owners of the west half of said section 24 through his will, which devised to Henry Myers the north one-third thereof, to Rose Myers the middle one-third thereof, and to Emily Myers the south one-third thereof, all subject to the life estate of Sarah C. Myers. Rose Myers has since died, leaving the appellees, Edgar, Fletcher and Ethel Myers as her sole heirs at law. On December 27, 1890, said Pickett sold and conveyed his said lands to the defendant, Lewis Chamberlin, and said Chamberlin took possession thereof, resided thereon, and continued to use the said way as appurtenant to his said lands in the same manner in which said Pickett had used the same until about eleven years ago, when the said Sarah C. Myers and Henry Myers, who were residing on the said lands, made a verbal agreement with the defendant, Chamberlin, whereby the said Chamberlin was to assist in moving the rail fence on the east line of said way and in rebuilding the same on a line eleven feet further east, and thereupon a strip eleven feet wide along the west line of the fence so removed was to be opened up so as to double the width of the way and make the same a joint way for the use of the lands of the said Chamberlin and of the lands of said plaintiffs. In pur-

suance to such agreement the said Chamberlin did assist in so removing and rebuilding the fence and the same was rebuilt of rails on a line eleven feet east of the dividing line, making the way about twenty-two feet wide through the entire length thereof, which was eighty rods. And thereafter the plaintiffs and said Chamberlin have used the way in common as a way of ingress and egress to and from their lands respectively. At the north end of the way the plaintiffs constructed a gate of lumber, hung on a post set in the ground, opening from said way into lots adjoining the farm buildings of the plaintiffs, so as to furnish access to the way from their said lands. Prior to the widening of the way as aforesaid the said Myers and his devisees after him, had gained access from said highway to said farm buildings by driving over the lands east of said fence and principally along a track next to said fence the same being pasture land, which was the only way they had used as an approach to said buildings. At the south end thereof, next to said line fence on the west, there was a gate opening out onto said highway, which gate was closed or removed when said fence was rebuilt. About a year after the moving of the fence and widening the way, the plaintiffs removed the rail fence on the east side of the way and rebuilt the same of wire and cedar posts set in the ground, placing the same on a line eleven feet distant from the center line of the way and continuing the said wire fence from the south end of said way eastward along said highway, also northward on both sides of said land so as to entirely inclose the same. In that part of the fence along said way plaintiffs built two gates, one at the south end, and the other about six rods south of

the north end, to provide access to said way from the fields and buildings on their said lands, which gates were constructed of lumber, and swung on hinges fastened to posts in the line of said fence. The corner posts and end posts in the fence at the gates were set five feet in the ground and anchored with rock and braces so that they cannot be removed. The defendant assisted in moving the fence, in consideration of the advantage which would accrue to him and his said lands by having said way widened for the joint use of the lands of both parties, and the plaintiffs in like manner, for like consideration, moved and rebuilt said fence and gates in good faith, relying on the said agreement and the permanent use of the widened way in common. During all the time said plaintiffs were so building the wire fence, the defendant stood by and made no objection thereto. The character of the fence and gates was such as to charge the defendant with notice that the plaintiffs intended to maintain the fence permanently on the said line and to use the way and the gates opening therein as a way appurtenant to their lands. The cost of moving and rebuilding the rail fence and of constructing the wire fence was about \$95. The latter could not be removed and rebuilt without practically destroying the same and to do so would cost \$80. About five years ago defendants purchased the said southeast quarter of the southeast quarter of said section 23 from said Burris, and has since moved the buildings from said northeast quarter of said southeast quarter onto the Burris tract near said highway. Before the bringing of this suit he notified the plaintiffs that he intended to move the fence on the west side of said way to the line dividing said sections 23 and 24,

and unless restrained by the court will move the same and close all that part of said way on his lands, leaving the same only ten or eleven feet in width, and wholly on the lands of the plaintiffs. This would greatly impair the usefulness and convenience of said way for the purpose of the plaintiffs and for the purpose for which it was established. It would cause material and continuous damage to the plaintiffs, and to the use and enjoyment of their said lands, by making the way so narrow that ordinary vehicles could not pass or turn therein to or from the same through the gates. In listing the lands for taxation no account has been taken of the way, but each owner of the several tracts of land has paid his respective taxes regardless thereof. The lands over which the way passes were and are of the value of \$100 per acre; that portion of defendant's lands covered by the way which he threatens to close being of the value of \$33.

Upon these facts the court stated as conclusions of law that appellees were entitled to a decree establishing the way to the full length thereof as bounded by the fences, as a perpetual farm way, in common and appurtenant to all of said lands of appellees and appellant, and enjoining appellant and those claiming under him from closing said way or any part thereof. On these conclusions of law judgment was rendered in favor of appellees.

Appellant filed a motion for a new trial, which was overruled, and has assigned as errors, on which he relies for reversal, that the court erred in stating each of its conclusions of law and in overruling his motion for a new trial.

The chief controversy in this case is over the rights acquired by appellees in the west half of the way by

adding the east half thereto, under the agreement with appellant, and the subsequent improvements made by them with reference thereto. It is apparent that what the parties to such agreement intended to effect thereby was an exchange of easements, and the special finding of facts clearly shows that this is what they really accomplished. If, however, we consider the agreement an attempt to exchange licenses, as the parties have done in presenting this appeal, the same result will follow.

It is well settled, on the grounds of equitable estoppel, that a parol license to use the lands of another is revocable at the pleasure of the licensor, un-

1. less the license has been given for a valuable consideration or money has been expended on the faith that it was to be perpetual or continuous.
2. When a license has been executed by an expenditure of money, or has been given on a consideration paid, it is either irrevocable altogether or cannot be revoked without remuneration, the reason being that to permit a revocation without placing the other party in *statu quo* would be fraudulent and unconscionable. *Campbell v. Indianapolis, etc., R. Co.* (1887), 110 Ind. 490, 11 N. E. 482; *Nowlin v. Whipple* (1889), 120 Ind. 596, 22 N. E. 669, 6 L. R. A. 159; *Ferguson v. Spencer* (1891), 127 Ind. 66, 25 N. E. 1035; *Joseph v. Wild* (1896), 146 Ind. 249, 45 N. E. 467; *Knoll v. Baker* (1904), 34 Ind. App. 124, 72 N. E. 480; *Jann v. Standard Cement Co.* (1913), 54 Ind. App. 221, 102 N. E. 872.

In the instant case the special finding of facts shows that the way in question is about twenty-two feet wide; that half thereof lies on the west side of the line dividing said sections 23 and 24 and half lies on the

east side thereof; that appellant had a right to use the west half thereof, and appellees owned the east half thereof; that appellant agreed that, in consideration of appellees granting him the right to use the east half thereof, he would grant to appellees the right to use the west half thereof; that in pursuance of such agreement, and in reliance thereon, appellees, with the knowledge of appellant, made valuable improvements with reference to said way. But appellant contends that these facts do not bring appellees within the rule stated above for two reasons: (1) The special finding of facts shows that at the time of the making of the agreement he was not the owner of the land covered by the west half of said way, but only had the right to use the same, and therefore his agreement did not give appellees any rights therein. (2) The special finding of facts does not show that appellees have not been placed in *statu quo*.

Respecting the first reason given by appellant in support of his contention, it should be noted that, while the special finding of facts shows that

3. he was not the owner of the fee-simple title to the real estate over which the west half of said way extends at the time of making the agreement in question, it further shows that he acquired such title about five years prior to the rendition of the judgment in this cause. While it is true, as appellant contends, that the owner of the dominant estate cannot subject the servient estate to additional burdens, it is equally true that if the owner of the former estate professes to do so, and subsequently becomes the owner of the latter estate, he will not be permitted to deny his authority to create such additional burden. *Shaw v. Proffitt* (1910), 57 Ore. 192, 109 Pac. 584, 110

Pac. 1092, Ann. Cas. 1913A 63. An eminent author has said that in such a case the ordinary doctrine of estoppel by deed applies. Washburn, Easements and Servitudes (4th ed.) 111. Under this doctrine, a person who assumes to convey an estate by deed is estopped, as against the grantee, to assert anything in derogation of the deed. He will not be heard, for the purpose of defeating the title of the grantee, to say that at the time of the conveyance he had no title or that none passed by the deed. 16 Cyc 686.

In this case there was no conveyance by deed, but appellant by a parol agreement, professed to confer on appellees the right to use the west half of

4. said way, and appellees, in pursuance of such agreement and in reliance thereon, yielded the agreed consideration therefor, entered into possession thereof, and, with the knowledge of appellant, made valuable improvements with reference thereto. Under these circumstances appellant may not assert an after-acquired title, and thereby deprive appellees of the rights he assumed to confer by his agreement, to their damage.

As to appellant's second reason, given in support of his contention that the special finding of facts does not show that appellees have not been placed

5. in *statu quo*, it suffices to say that such a finding is not necessary to appellees' right of recovery. If it be conceded that the facts of this case are such that the license granted appellees to use the west half of said way could be revoked by placing appellees in *statu quo*, the fact of revocation would be a matter of defense. Under the rules stated above it was only necessary that appellees show a license, the payment of a consideration, or the expenditure of money in reliance thereon. This established a

prima facie case in their favor, and the burden was on appellant to establish the facts necessary to constitute an effective revocation.

Appellant also contends that injunctive relief is not authorized, because the facts show that any injury sustained by the alleged threatened acts

6. can be fully compensated in damages by an action at law. The rule which the appellant seeks to invoke is not applicable, if such legal remedy is not as practicable, efficient and adequate as that afforded by equity. *Cincinnati, etc., Railroad v. Wall* (1911), 48 Ind. App. 605, 96 N. E. 389; *Shedd v. American Maize, etc., Co.* (1915), 60 Ind. App. 146, 108 N. E. 610. Whether a complaining party has a legal remedy which will afford complete justice must be determined under all the circumstances of the case and in view of the conduct of the parties. *Drew v. Town of Geneva* (1898), 150 Ind. 662, 50 N. E. 871, 42 L. R. A. 814; *Fisher v. Carey* (1918), 67 Ind. App. 438, 119 N. E. 376. In determining the adequacy of legal remedies and the consequent superiority of equitable remedies, some force is given to the fact, if it exists, that the former are vexatiously inconvenient, or that a denial of the latter results in irritation, annoyance, and embarrassment readily relieved by the application of such remedy. *Haines v. Trueblood* (1918), 67 Ind. App. 456, 119 N. E. 383. It has been held that a threatened continuous disturbance of an owner's right of possession authorizes injunctive relief. *Miller v. Burket* (1892), 132 Ind. 469, 32 N. E. 309; *Brenner v. Heiler* (1910), 46 Ind. App. 335, 91 N. E. 744. In this case the facts show that appellees had acquired a right to the use and peaceful enjoyment of that part of the way which appellant threatens to close permanently. Any obstruction of the

same would be a violation of his right and its closing would be a denial of possession. In the light of the facts found and rules stated, we cannot say that the court erred in applying the equitable remedy.

Appellant also contends that the evidence shows that the closing of the west half of said way would leave appellees in *statu quo*. We cannot

7. agree with this view. The special finding of facts shows that, prior to the time appellees acted on the agreement with appellant with reference to widening said way, their fence was located eleven feet west of its present location, and they used a way on the east side thereof with a gate at the south end opening into the public highway; that the gate had been closed with a wire fence and two other gates constructed in their fence on the east side of the way; that, if the west half of the way were closed and a fence built on the line dividing said sections 23 and 24, the remaining way would be so narrow that ordinary vehicles could not pass or turn therein. These facts are sustained by the evidence, and clearly show that the closing of the west half of the way would not leave appellees in *statu quo*, as contended by appellant.

The other contentions made by appellant with reference to the action of the court in overruling his motion for a new trial are fully covered by what we have said relating to the correctness of the conclusions of law, and therefore do not require further consideration.

We find no error in the record. Judgment affirmed.

NOTE.—Reported in 120 N. E. 600. Licenses: to maintain a burden on land after the licensee has incurred expenses in creating the burden, revocability, 49 L. R. A. 505. See under (1, 2) 25 Cyc 645-649; (6) 35 L. R. A. (N. S.) 193, 19 C. J. 992.

CHICAGO, TERRE HAUTE AND SOUTHEASTERN RAILWAY
COMPANY v. BARNES.

[No. 9,492. Filed March 19, 1918. Rehearing denied June 26, 1918.
Transfer denied October 30, 1918.]

1. RAILROADS.—*Crossing Accidents.—Pleading.*—Where a ten year old child was lawfully upon a highway that crossed the defendant's tracks, the defendant owed her the duty to exercise reasonable care for her safety in operating a train toward her, and, under such circumstances, a general charge of negligence is sufficient as against demurrer. p. 357.
2. NEGLIGENCE.—*Pleading.—Contributory Negligence.*—In a complaint to recover damages for a personal injury caused by negligence, it is not necessary to allege the plaintiff's freedom from contributory fault, in view of §362 Burns 1914, Acts 1899 p. 58. p. 357.
3. PLEADING.—*Contributory Negligence.—Questions of Fact.*—In actions for personal injuries caused by negligence, the court may not hold as a matter of law that a complaint discloses contributory negligence, unless the facts pleaded compel such an inference. p. 358.
4. TRIAL.—*Reception of Evidence.—Discretion of Court.*—Though the course of procedure as to the introduction of evidence should as a rule conform to §558, cl. 3, Burns 1914, §533 R. S. 1881, it is within the discretion of the court to permit a party to introduce further evidence after he or his adversary has closed his case in chief, and such action will be reviewed on appeal only where there is an abuse of the discretion. p. 359.
5. RAILROADS.—*Action for Injuries.—Burden of Proof.—Reception of Evidence.*—Since, in actions for personal injuries caused by negligence, the burden is on the defendant to prove the plaintiff's contributory negligence, the plaintiff had the right, after the defendant had closed its case, to offer evidence on such issue to meet that introduced by the defendant. p. 359.
6. RAILROADS.—*Action for Injuries.—Contributory Negligence.—Evidence.—Sufficiency.—Jury Question.*—In an action for damages sustained by a ten year old child in a crossing accident, the evidence is reviewed and held sufficient to sustain the verdict for the plaintiff as against an objection that the evidence established contributory negligence as a matter of law. p. 359.
7. NEGLIGENCE.—*Contributory Negligence.—Children.*—In an action against a railroad company for damages sustained by a ten year old child in a railroad crossing accident, where there was no con-

Chicago, etc., R. Co. v. Barnes—68 Ind. App. 354.

tention that the child was *non sui juris*, the rule is that such child was capable of contributory negligence and was required to use such reasonable care for her own safety as ought ordinarily to be expected from children of like age, knowledge, judgment, discretion and experience, under the same or similar circumstances. p. 363.

8. **NEGLIGENCE.—Contributory Negligence.—Children.—Instruction.**—A child of tender years, who was injured in a railroad crossing accident, was not required to exercise the degree of care incumbent on an adult; hence, instructions on the degree of care required were not erroneous as requiring the conduct of such child to be measured by the standard of a child rather than that of an adult. pp. 363, 365, 366.
9. **RAILROADS.—Crossing Accidents.—Contributory Negligence.—Children.**—In determining the question of contributory negligence of a child of tender years, who was injured in a crossing accident, effect is given to diverting causes, to partially obstructed crossings and to the fact that the train which struck the child approached the crossing without giving warning or signals. p. 365.
10. **RAILROADS.—Crossing Accidents.—Action for Injuries.—Contributory Negligence.—Instruction.**—In an action against a railroad company for injuries sustained by a ten year old child in a crossing accident, an instruction that, if a child ten years old finds herself confronted with danger and confusion, caused by the negligence of the defendant's employes in failing to give proper warning, such child would not be required to act with the prudence and promptness of a person of more mature years, was not objectionable as being without the issues, it being directed to the question of contributory negligence. p. 365.
11. **APPEAL.—Review.—Harmless Error.—Instruction.**—In an action for injuries sustained by a child in a crossing accident, an instruction submitting the question whether the child made such use of her physical senses for her own protection as should reasonably be expected of other children of like age, experience and intelligence, though incomplete for failing to limit the conduct of such other children to similar circumstances, was not reversible error, in view of the language of the entire instruction. p. 366.
12. **RAILROADS.—Crossing Accidents.—Instruction.**—In an action against a railroad company for injuries sustained by a ten year old child in a crossing accident, a complaint alleging that the defendant negligently and carelessly drove its engine toward and over the crossing without ringing the bell or blowing the whistle, and without giving any notice of its approach, was sufficient to warrant instructions relative to the duty of blowing

a whistle and ringing a bell required of railroad companies under §5431 Burns 1914, §4020 R. S. 1881. p. 368.

13. **APPEAL.—Review.—Harmless Error.**—In an action for injuries sustained by a ten year old child in a crossing accident, where the defendant tendered an instruction that if it failed to give statutory signals, but did give other warnings of the approach of the train, the plaintiff could not recover, the error, if any, in an instruction as to the defendant's statutory duty to give warning signals, was one of which the defendant may not complain, the error having been invited. p. 369.

14. **DAMAGES.—Adequacy.—Personal Injuries.**—Where a ten year old child was struck by a train at a highway crossing, and sustained a fracture of a collar bone, and the bone of the forearm, a cut on the head and various other wounds and bruises, a verdict of \$1,200 was not excessive. p. 370.

From Vigo Superior Court; *Fred W. Beal*, Judge.

Action by Mary C. Barnes, by William Barnes, her next friend, against the Chicago, Terre Haute and Southwestern Railway Company. From a judgment for the plaintiff, the defendant appeals. *Affirmed.*

Beasley, Douthitt, Crawford & Beasley and *William F. Peter*, for appellant.

Walker & Blankenbaker, for appellee.

CALDWELL, J.—In the western edge of the town of Lewis, Vigo county, a public highway extends north and south. Appellant's single track railroad extends through the town intersecting the public highway practically at grade, the direction of the former at the point of intersection, and for some distance north-westward therefrom, being north thirty-five degrees west. On September 23, 1913, at about five o'clock p. m. appellee, a child ten years old, while walking south along the highway, attempted to cross appellant's track, whereupon she was struck by one of appellant's trains southward bound, and was thereby seriously injured. She by her next friend brought

Chicago, etc., R. Co. v. Barnes—68 Ind. App. 354.

this action to recover damages on account of such injuries. A trial resulted in a verdict for \$1,200, upon which judgment was rendered.

Appellant urges that the complaint contains no sufficient averment of negligence or of proximate cause, and that the complaint affirmatively dis-

1. closes that appellee was guilty of contributory negligence, and that as a consequence the court erred in overruling the demurrer filed thereto. The substance of the charge of negligence, which is repeated in various forms, is that the appellant negligently caused a train to approach and pass over the crossing without ringing the bell or blowing the whistle, and negligently ran the train against appellee without giving any notice or warning of its approach. The complaint discloses that appellee lived south of the intersection, and that she was traveling the highway for the purpose of going to her home. It follows that she was lawfully using the highway. Appellant, therefore, in operating the train towards and over the crossing, owed her the duty to exercise reasonable care for her safety. Under such circumstances the general charge of negligence is sufficient as against demurrer. *Indiana Union Traction Co. v. Hiatt, Admr.* (1917), 65 Ind. App. 233, 114 N. E. 478, 115 N. E. 101, and cases.

On the subject of proximate cause it is sufficiently alleged in substance that appellee suffered her injuries by reason of the negligence charged.

In an action to recover damages for a personal injury suffered through the negligence of the defendant, it is not necessary to the sufficiency of the

2. complaint that it contain an allegation of the plaintiff's freedom from contributory fault.

§362 Burns 1914, Acts 1899 p. 58; *Indiana*

3. *Union Traction Co. v. Reynolds* (1911), 176

Ind. 263, 95 N. E. 584. In such a case it is necessary only that the complaint shall not affirmatively show that the plaintiff was guilty of contributory negligence. *Chicago, etc., R. Co. v. Coon* (1911), 48 Ind. App. 675, 93 N. E. 561, 95 N. E. 596. Since in such an action a plaintiff is not required to negative his own contributory fault, the inferences on that subject, which may be legitimately deduced from the facts alleged, should be indulged in his favor. In such a case a court may not as a matter of law hold that a complaint discloses contributory negligence, unless the facts alleged compel such an inference. *Greenawaldt v. Lake Shore, etc., R. Co.* (1905), 165 Ind. 219, 74 N. E. 1081; *Cleveland, etc., R. Co. v. Lynn* (1909), 171 Ind. 589, 85 N. E. 999, 86 N. E. 1017. There is no general averment in the complaint that appellee was free from fault contributing to her injury. The facts alleged, which may be said to bear somewhat on that question, are to the effect that certain buildings, trees, etc., obstructed appellee's view, and prevented her from detecting the approach of the train prior to the time when she was struck as aforesaid; that the train approached without warning; that had the bell been ringing, or the whistle sounded, appellee would have heard such signal and kept off the crossing, and that appellee was a child only ten years old. Measured by the principles above outlined, it does not appear affirmatively that appellee was guilty of contributory negligence. There was no error in overruling the demurrer to the complaint.

Appellee did not testify as a witness while presenting her case in chief. After the close of appel-

lant's evidence, the court permitted her to testify respecting her movements and conduct until just before she was struck by the train. It is urged that the court thereby erred.

5. Doubtless the course of procedure outlined by subdivision 3 of §558 Burns 1914, §533 R. S. 1881, should as a rule be followed. However, it is within the discretion of the trial court to permit a party to introduce further evidence after he or his adversary has closed his case in chief, and the action of the trial court in this respect will not be reviewed on appeal, except where it clearly appears that such discretionary power has been abused. *Miller v. Dill* (1898), 149 Ind. 326, 49 N. E. 272; *Holmes v. Hinkle* (1878), 63 Ind. 518; *Stewart v. Stewart* (1902), 28 Ind. App. 378, 62 N. E. 1023; *Noblesville Gas, etc., Co. v. Teter* (1890), 1 Ind. App. 322, 27 N. E. 635; 38 Cyc 1363 *et seq.* It does not appear here that appellant was prejudiced by the action of the court, or that there was any abuse of discretion. Moreover, it may be said that most, if not all, of appellee's testimony as a witness bore upon the issue of contributory negligence, respecting which appellant had the burden. She had a right, after appellant had closed its case, to offer evidence bearing on that question meeting testimony offered by appellant. Doubtless the court would have accorded to appellant the right and privilege of rebutting appellee's testimony, if desired.

Appellee challenges the sufficiency of the evidence in its relation to the issue of contributory negligence.

The physical surroundings were as follows:

6. The highway extended north and south. The railroad was elevated about a foot, and extend-

ed north, thirty-five degrees west. Both the highway and the railroad approached the intersection on a down grade from the northward. The latter was straight from the intersection for about one mile to the northwest. There were slight elevations and depressions in the track within that distance, however. On the west side of the highway and north of the crossing there was a row of houses; the nearest, the Foreman dwelling, was about 165 feet from the track. About 180 feet up the track and within eight feet of it on the northeast side there was a hand-car house, fourteen feet square and ten feet high. West of the Foreman house there was a barn, and south and west of it there were outbuildings, trees, grapevines, etc., which obstructed the view of the track to a person looking from the highway between the house and the carhouse. East and southeast of the carhouse there were other trees. Along the west side of the highway a picket fence extended south to the north line of the right of way, and thence a distance of about fifty feet there was a wire fence, and next to the railroad there was a cattle guard fence made of horizontal boards, with 8-inch spaces between them. A foot path, commonly used by pedestrians, extended south along the west side of the highway and near the fence. It was depressed somewhat below the surface of the surrounding ground. The path angled southeast near the track and thence along and between the rails to the center of the road, and thence southeast and south along the east side of the highway. The station at Lewis is southeast of the crossing.

The train did not sound the crossing signal for the crossing here. There was some conflict in the evi-

dence whether the whistle was sounded for the station, and whether the bell was ringing at the time of and prior to the accident. The train coasted down the grade towards the crossing at the rate of twenty miles per hour. The power was shut off and it made but little noise. About 150 feet from the crossing, and apparently when the engineer discovered appellee, the danger signal was sounded. Very quickly thereafter appellee was struck and knocked from the track. Appellee approached the track along the path. There was some evidence that she was running, and other evidence that she was walking, and still other evidence that she was walking until she neared the track and that she then ran along, angling across it, until struck near the southwest rail. Immediately after the danger signal was given, a witness who was near the depot ran towards her waving his hat. The engineer testified that appellee was in a falling position before she was struck. To a person traveling along the footpath the view is practically unobstructed up the track as far as the carhouse. There was substantial evidence that at all points along the path until the observer was near the track the view beyond the carhouse was almost completely obstructed. Some time after the accident the carhouse was removed and some of the obstructing trees on Foreman's premises were cut down. There was evidence based on observations made after the removal of the carhouse, but allowing for its presence, that a person standing in the path at the north line of the right of way could see up the track 217 feet, and from a point twenty-five feet from the north rail, 634 feet, and from a point fifteen feet from the north rail, practically a mile.

Appellee's account of the transaction was as follows: After school she went direct to the home of certain relatives living north of the crossing on an errand for her mother. In returning she came along the path; nearing the track she stood on tiptoe and peeked through the fence to see if a train was coming. Not seeing or hearing a train, she went on, as she said, past the railroad, and saw a man running towards her waving his hat. She testified that she did not know what happened after that.

Appellant contends that appellee looked southeast rather than northwest. This contention is based on a statement in her testimony at one place that she peeked through the fence and looked east and south. It is evident, however, that she was confused in directions. Thus, there was no evidence that she was on the west side of the fence west of the highway, and no evidence that there was a fence east of the highway, or, if a fence was there, that she was near it. She testified that the path was on the northeast side of the road, and was confused as to the direction of the highway. She stated also that she looked north through the fence, but saw no train. It therefore seems apparent that the statement to which appellant gives force was the outgrowth of confusion as to directions.

Appellee, prior to the injury, was in good health, had good eyesight and hearing, and was of average intelligence. She was acquainted with the crossing, knew that trains ran on the track there, and had been cautioned to be on the lookout for them.

Can it be said as a matter of law that under this evidence appellee was guilty of contributory negli-

Chicago, etc., R. Co. v. Barnes—68 Ind. App. 354.

gence? It is neither alleged nor contended that
7. appellee was *non sui juris*. She was therefore capable of contributory negligence and was required to exercise for her own safety such reasonable care as ought ordinarily to be expected from children of like age, knowledge, judgment, discretion and experience under the same or similar circumstances. *Plummer v. Indianapolis Union R. Co.* (1914), 56 Ind. App. 615, 104 N. E. 601; *Cleveland, etc., R. Co. v. Miles* (1903), 162 Ind. 646, 70 N. E. 985; *Indianapolis Traction, etc., Co. v. Croly* (1913), 54 Ind. App. 566, 96 N. E. 973, 98 N. E. 1091.

We are not required to determine whether appellee, had she been an adult of average capacity, should under the facts be held guilty of contributory
8. negligence as a matter of law. Appellee was but a child of tender years; she was not required to exercise the degree of care incumbent on an adult. *Baltimore, etc., R. Co. v. Hickman* (1907), 40 Ind. App. 315, 81 N. E. 1086; *Terre Haute St. R. Co. v. Tappenbeck* (1893), 9 Ind. App. 422, 36 N. E. 915; *Jacobs v. Koehler, etc., Co.* (1913), 208 N. Y. 416, 102 N. E. 519, L. R. A. 1917F 7.

The evidence most favorable to appellee was to the following effect: When near the track, the exact point not being disclosed, she stopped and peeked through the fence to see if a train was approaching. She neither saw nor heard a train. The carhouse was 180 feet up the track. From some points of observation along the fence the carhouse limited vision. From other points the scope of vision extended beyond it. The train at twenty miles per hour ran the 180 feet in about six seconds, and other distances in proportion. She saw no train. The carhouse limited her

vision. But it is said that she should have chosen a point of observation so as to render looking effective. No higher duty than this is required of an adult. *Baltimore, etc., R. Co. v. Hickman, supra.* As the train approached it made but little noise; it was coasting, the power off, the bell not ringing. The danger signal was given at a point 120 to 150 feet up the track. This distance was covered by the train in four or five seconds. Immediately following the danger signal appellee discovered a man running towards her excitedly waving his hat. Out of the comparative stillness there came four short, sharp blasts of the whistle, followed by the man running, waving his hat. It may be said that appellee thus had sufficient warning to jump from the track; but possibly the effect of such occurrences was to disconcert, to confuse. The engineer testified that appellee was in the act of falling before she was struck. Had appellee looked up the track when near it, she could have seen the train. She testified that she did not remember whether she looked again after peeking through the fence. She had been warned to look out for trains when crossing the track, but being a child, with the judgment and discretion of a child, perhaps she thought that, as she saw no train when she peeked through the fence, she would have time to cross in safety, even though there was a train beyond the car-house. Perhaps the instinct of safety, childlike, urged her to hurry across the track by the usual path. There was evidence that she was running, and other evidence that as she neared the track she commenced to run. It is said in a case involving a child somewhat older than appellee and of like knowledge and experience, that, where such a child uses some

Chicago, etc., R. Co. v. Barnes—68 Ind. App. 354.

care for her own safety, it is for the jury to say whether the care used was such as might ordinarily be expected from a child of such age and experience. *Indianapolis Traction, etc., Co. v. Croly, supra; Baltimore, etc., R. Co. v. Hickman, supra.*

In case of children of tender years, that effect is given to diverting causes, partially obstructed crossings, and the fact that a train approaches

9. without signals or warning, in determining the question of their contributory negligence when injured at a crossing, see the following: *Holmes v. Missouri, etc., R. Co.* (1905), 190 Mo. 98, 88 S. W. 623; *Crabtree v. Missouri, etc., R. Co.* (1910), 86 Neb. 33, 124 N. W. 932, 136 Am. St. 663; *Byrne v. New York, etc., R. Co.* (1881), 83 N. Y. 620; *Atchison, etc., R. Co. v. Hardy* (1899), 94 Fed. 294, 37 C. C. A. 359; *Byron v. Central Railroad* (1906), 215 Pa. St. 82, 64 Atl. 328; *Ewen v. Chicago, etc., R. Co.* (1875), 38 Wis. 613.

We conclude that the question of appellee's contributory negligence in this case was one of fact for the jury.

The eighteenth instruction was in part to the effect that, if a child ten years of age finds herself confronted with danger and confusion, caused by

8. the negligence of the employes of a railroad company in failing to give proper warning of the approach of a train to a crossing, such child will not be required to act with the prudence and promptness of a person of more mature years and experience in an effort to avoid injury. The nineteenth contained the element that, in determining the question of appellee's contributory negligence, her conduct should not be measured by the conduct of a person

of mature years; that such a child is required to exercise only such an amount of care as is in accord with her maturity, experience and capacity. The sixteenth submitted to the jury the question whether appellee made such use of her physical senses for her own protection as should reasonably be expected of other children of like age, experience and intelligence.

The eighteenth instruction is objected to on the ground that it was without the issues. It was directed to the question of contributory negli-

10. gence, and therefore was within the issues. It was applicable also to the evidence, and especially to the situation in which appellee was

11. placed when the warning signals had been given and a man came running, excitedly waving his hat. The sixteenth instruction is criticized be-

8. cause it prescribes as a measure of care the reasonable conduct of other children of like age, etc., generally, without limiting such conduct of such other children to circumstances the same or similar to those in which appellee found herself placed. The instruction to be complete should have contained such element. We believe, however, that such element is reasonably understood, and that the jury could not have been misled by its omission, especially in view of the language of the entire instruction. The court was speaking of appellee's conduct in approaching and attempting to cross the railroad, and in that connection stated that the jury should determine from the evidence whether she exercised the care that would reasonably be expected of other children, etc. We do not believe that the jury could have received any other impression from the instruc-

tion than that the court was speaking of the circumstances in which appellee found herself placed. Like instructions not containing the omitted elements have been approved. *Jacobs v. Koehler, etc., Co., supra*. The sixteenth, eighteenth and nineteenth instructions are criticized also by reason of the element that appellee's conduct should be measured by the child rather than the adult standard. There was no error in this respect, as applied to such a child as is involved here. See the following: *Baltimore, etc., R. Co. v. Hickman, supra*; *Terre Haute St. R. Co. v. Tappenbeck, supra*; *Indianapolis, etc., R. Co. v. Wilson* (1893), 134 Ind. 95, 33 N. E. 793; *Cleveland, etc., R. Co. v. Miles, supra*; *Railroad Co. v. Gladmon* (1872), 15 Wall. 410, 21 L. Ed. 114; *Linthicum v. Truitt* (1911), 2 Boyce (Del.) 338, 80 Atl. 245; *Wright v. Detroit, etc., R. Co.* (1889), 77 Mich. 123, 43 N. W. 765; *Springfield, etc., R. Co. v. Welsch* (1895), 155 Ill. 511, 40 N. E. 1034; *Vessels v. Metropolitan St. R. Co.* (1908), 129 Mo. App. 708, 108 S. W. 578; *Jacobs v. Koehler, etc., Co., supra*, L. R. A. 1917F, note p. 13 *et seq.*

In the case last cited, the following is said respecting the contributory negligence of a child fourteen years of age: "There doubtless comes a time in the life of a child when, though still in law an infant, it reaches such maturity that no distinction on account of age can be drawn in its favor. It is not necessary to determine what that time is. It is sufficient to say that, if a question of law and not of fact, the age is greater than that of deceased."

The court by the fourth instruction informed the jury respecting the substance of the statute requiring

that the whistle be sounded and the bell rung

12. as a locomotive engine approaches a highway crossing, the reference being to §5431 Burns 1914, §4020 R. S. 1881, and, by the sixth instruction, that by the terms of such statute the whistle must be sounded three times distinctly when the engine is not more than 100 rods or less than eighty rods from the crossing, and that the bell must be rung continuously after the whistle is sounded and until the engine shall have passed the crossing; and by the tenth instruction that the failure either to sound the whistle or to ring the bell as required is negligence; and by the twenty-first instruction that the complaint contained a charge of negligence predicated not only on the breach of a common-law duty, but also a charge based on the failure to ring the bell as required by the statute.

It is urged that these instructions were erroneous for the alleged reason that the complaint contains no charge of negligence based on the failure to give the statutory signals. The complaint charges that appellant negligently and carelessly drove its engine towards and over the crossing without ringing any bell or blowing any whistle, and without giving any notice or warning of the approach of the train, and that appellant negligently and carelessly ran said train against appellee, without giving any notice or warning of the approach thereof, and that appellant negligently and carelessly ran said train upon the crossing and against appellee, without ringing any bell or sounding any whistle, or giving any notice or warning of the approach thereof. In addition to these general allegations, the complaint contains allegations directed to acts and omissions of appellant when the train was within 300 feet or 400 feet of the crossing.

While it would seem that good pleading requires that the allegations of a complaint based on the failure to give the statutory signals should be more

13. specific than as indicated above, yet under the decided cases, in view of such general allegations, the complaint states a cause of action based on the failure to give the statutory signals. *Pittsburgh, etc., R. Co. v. Terrell* (1912), 177 Ind. 447, 95 N. E. 1109, 42 L. R. A. (N. S.) 367; *Baltimore, etc., R. Co. v. Young* (1896), 146 Ind. 374, 45 N. E. 479; *Chicago, etc., R. Co. v. Coon* (1911), 48 Ind. App. 675, 93 N. E. 561, 95 N. E. 596. It follows that the criticism of such instructions as indicated is not well grounded. Moreover, the question whether the engine bell was ringing as the train approached the crossing was tried out; in addition there was uncontradicted evidence, heard without objection, that the whistle was not sounded for the Foreman crossing as required by the statute. Under such circumstances, if it might be said that the complaint does not contain a sufficient charge of negligence based on the failure to give the statutory signals, it should be deemed amended to conform to the evidence. *Chicago, etc., R. Co. v. Gorman* (1915), 58 Ind. App. 381, 106 N. E. 897. Also, appellant by its sixth tendered instruction apparently recognized that the failure to give the statutory signals was one of the questions involved in the case. That instruction contained language to the effect that, if appellant failed to give the statutory signals, but did give other sufficient warning of the approach of the train, appellee could not recover. Under such circumstances, if there were error in giving the instructions under consideration, it should be classed as invited, and of which appellant may not be heard to

Curtis, Rec., v. Chicago, etc., R. Co.—68 Ind. App. 370.

complain. *Chicago, etc., R. Co. v. Gorman, supra*, and cases.

The injuries that appellee suffered consisted of a fracture of the collar bone, and also of a bone of the forearm, a cut on the head, and various,

14. other wounds and bruises. There was conflict in the evidence respecting the extent to which she was permanently injured, if at all. Under the rule that governs on appeal, we do not regard as excessive a verdict for \$1,200.

There are 109 causes assigned for a new trial, a large number of which are presented by the briefs. Those not specifically discussed in this opinion have also received the careful consideration of the court. We find in them no substantial error.

Judgment affirmed.

NOTE.—Reported in 119 N. E. 26. See under (7) 33 Cyc 1114; (8, 11) 33 Cyc 992, 1138; (13) 17 C. J. 1101.

CURTIS, RECEIVER, v. CHICAGO AND ERIE RAILWAY
COMPANY.

[No. 9,411. Filed May 28, 1918. Rehearing denied October 31, 1918.]

1. SET-OFF AND COUNTERCLAIM.—*Counterclaim.*—*Pleading in Action on Contract.*—In an action against a railway company for damages caused by the forcible removal from defendant's right of way of plaintiff railway company's tracks, which had been constructed on defendant's property pursuant to a contract, defendant could counterclaim for damages resulting from the failure of plaintiff to comply with the terms of the agreement. p. 375.
2. RECEIVERS.—*Permission to Sue.*—*Counterclaim.*—Although it is the general rule that a receiver can neither sue nor be sued without leave of court, yet a defendant in an action brought by a receiver may file an appropriate counterclaim without first obtaining per-

Curtis, Rec., v. Chicago, etc., R. Co.—68 Ind. App. 370.

mission to sue the receiver, in view of §352 *et seq.* Burns 1914, §347 R. S. 1881, relating to set-off and counterclaim. p. 376.

From Whitley Circuit Court; *Luke H. Wrigley*, Judge.

Action by James C. Curtis, receiver, against the Chicago and Erie Railway Company. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

Lesh & Lesh and *McNagney & McNagney*, for appellant.

W. O. Johnson, *D. V. Whiteleather*, *U. Z. Wiley* and *A. S. Lytton*, for appellee.

DAUSMAN, J.—Appellant instituted this action against appellee to recover damages. After both parties had introduced their evidence, the court on appellee's motion instructed the jury to return a verdict for appellee. Judgment that appellant take nothing by his action and against him for costs.

Briefly stated, the material facts averred in the first paragraph of complaint are as follows: That for many years appellee has owned and operated a railroad extending across the State of Indiana and through the counties of Huntington and Wells; that in 1907 the Cincinnati, Bluffton and Chicago Railway Company constructed its road from Huntington to Portland, Indiana, through the towns of Simpson, Markle and Uniondale; that in 1908 appellant was appointed receiver for the last-named company. The right of way of the C. B. & C. parallels and adjoins the right of way of the C. & E. from Huntington eastwardly for a distance of some fifteen miles; that its track for said distance was constructed on its own right of way, except that through the city of Huntington and the towns of Simpson, Markle and Union-

dale it was constructed on the right of way of the C. & E., pursuant to an oral agreement between the two companies; that the parts of appellant's railroad so constructed on the C. & E.'s right of way consisted of a roadbed of earth, ballast, ties and rails, was properly drained, and was a substantial railroad over which it operated its freight and passenger trains; that appellant operated its trains on said road until May 19, 1912, on which day the C. & E. by its agents and servants forcibly removed from its right of way the portions of appellant's track which had been laid thereon through the towns of Markle and Uniondale; that thereupon appellant obtained from the Huntington circuit court a restraining order, by the terms of which appellee was restrained from further interfering with appellee's property wherever situated; that appellee declared it would not abide by the restraining order, but would proceed to remove from its right of way the other portions of appellant's track, as it had done at Markle and Uniondale, unless appellant removed said portions of its own track; that, believing appellee would carry out its threat and would violate the restraining order, appellant did remove its own track from the C. & E. right of way in the city of Huntington; that on January 12, 1913, the C. & E. forcibly removed from its right of way the remaining portion of appellant's track at the town of Simpson, and that after removing said portions of appellant's track the C. & E. appropriated to its own use the grade constructed by appellee and laid a track of its own thereon; that in the removal of said portions of track a large number of ties, bolts and spikes were destroyed, carried away or lost; that some of the rails were hauled a considerable distance

from the place where taken up; that by reason of said removal the operation of trains was temporarily suspended, resulting in loss of freight, passenger and express business; that appellant was deprived of the grade, ballast and drainage which it had constructed or placed on appellee's right of way; that it was obliged to procure new right of way and construct new track thereon; that the cost of removing said track and the construction of new track was in excess of what the cost would have been had the removal been accomplished pursuant to legal proceeding; that the right of way which appellant was obliged to acquire on which to construct its new track cost a sum greatly in excess of its true value and greatly in excess of what it would have cost if appellant could have had an opportunity to negotiate therefor with such deliberation as he would have had if said removal had been accomplished by legal procedure; that the removal of said track as aforesaid was a connected series of wrongful and aggressive acts forming a single trespass designated to cripple and injure and embarrass appellant in the continued operation of its railroad; that said actions and trespasses were unlawful and without process of law, and that by reason thereof appellant has been damaged in the sum of \$50,000.

The second paragraph of complaint is substantially the same as the first, except that the averment concerning the agreement between the two companies is given greater prominence. With respect to this matter it is averred that certain tracks were constructed by the Cincinnati, Bluffton and Chicago Railway Company on the right of way of the Chicago and Erie Railway Company under a parol contract

between the two companies by the terms of which the Cincinnati, Bluffton and Chicago Railway Company acquired the right to occupy the other's ground permanently or for a term of years and in consideration therefor it gave to the C. & E. Co. an option to purchase certain of its property and facilities within a reasonable time at a stipulated figure. It is then averred that differences arose between the two companies concerning the terms and conditions of the tenancy, and that, pending negotiations for the adjustment of said differences, the defendant entered upon the premises and forcibly ejected the plaintiff, etc.

Appellee filed answer in nine paragraphs, and also a counterclaim. It appears that the oral agreement referred to in the complaint contained a provision to the effect that it should be reduced to writing, and accordingly this was done on June 22, 1910. The written agreement contains all the covenants between the parties, was duly executed by both companies, and was filed with and made a part of both the answer and the counterclaim.

The counterclaim is too voluminous to be set out in full. In addition to the many other allegations, it avers that the C. B. & C. Co. is indebted to the C. & E. Co. for doing certain work under articles 6 and 7 of the contract, for various sums due under article 20, for its proportion of operating expenses under articles 14 and 17, for moving the stations at Markle and Uniondale, for equipment and labor in replacing ties east of Huntington, for loan of equipment, for car service, for coal furnished for its engines, for supplies furnished from the C. & E. shop at Huntington, for maintaining and operating the

Curtis, Rec., v. Chicago, etc., R. Co.—68 Ind. App. 370.

switch at Huntington, for judgment rendered by the Huntington Circuit Court, for rent, maintenance, operation, water, labor, material, repairs, rerailing engine, piloting and detouring trains, and for the cost of removing the tracks as provided by the contract—the total amount of which items is \$15,688.70; that by reason of the failure of the C. B. & C. Co. to perform certain other conditions of the contract, and as indemnities against expenses and losses made and sustained by the C. & E. Co., the former is indebted to the latter in the further sum of \$300,000; that all the matters alleged in the complaint and in this counterclaim arose out of the contract, and in order that the entire controversy may be settled promptly, and that full justice may be done to all concerned, it is essential that the respective claims of the parties be tried and adjudicated in a single action; that the C. B. & C. Co. is insolvent; that all its property has been sold by the receiver for \$350,000; that the preferred claims, as determined and fixed by the court, amount to \$375,000; that no part of appellee's claim is preferred; that appellee has no remedy against said company and its receiver unless its claim may be considered and adjudicated herein, and that unless its claim be so adjudicated, appellee will suffer irremediable injustice.

The only alleged errors presented for our consideration are the overruling of the demurrer to the counterclaim, and the directing of a verdict for the defendant.

The objections to the counterclaim, disclosed by the memorandum and properly presented by appellant's brief, are: (1) That the matters averred

1. in the counterclaim arise out of contract and cannot be pleaded to plaintiff's cause of action,

which is founded on tort; and (2) that it is not averred in the counterclaim that defendant had obtained permission of the proper court to prosecute its action against the receiver. The first objection is not well taken. *Excelsior Clay Works v. DeCamp* (1906), 40 Ind. App. 26, 80 N. E. 981. The

2. second objection is untenable. True, the general rule is that a receiver can neither sue nor be sued without leave of court first obtained. *Wayne Pike Co. v. State, ex rel.* (1893), 134 Ind. 672, 34 N. E. 440. But, where an action has been commenced by a receiver, it would be a strange rule that would require the defendant in that action, who has been brought into court on the receiver's summons, to obtain leave of court to present any matter in his behalf which is germane to the controversy. It is the policy of the Code of Civil Procedure that the entire controversy between the parties shall be settled, if possible, in a single action. §352 *et seq.* Burns 1914, §347 R. S. 1881. Appellee might have been seriously disadvantaged by a failure to file his counterclaim. §356 Burns 1914; §351 R. S. 1881; *Reichert v. Krass* (1895), 13 Ind. App. 348, 40 N. E. 706, 41 N. E. 835.

Did the court err in directing the verdict? The following provisions of the written contract are essential to an understanding of this question:

“Article 20. * * * It is further agreed that in case either company shall fail to pay the other all sums when and as due under the terms of this agreement or to comply with or perform any of the covenants or obligations in this agreement by it to be kept and performed, and such default shall continue for a period of thirty days after written notice thereof to it, then and in

Curtis, Rec., v. Chicago, etc., R. Co.—68 Ind. App. 370.

such case said other company shall have the right, at its option, to immediately terminate this agreement. * * *

“Article 22. Upon the termination of this agreement the Cincinnati Company agrees to remove the tracks, buildings and other facilities from the right of way of the Erie Company * * * and to restore such right of way to the same or as good condition as before said tracks were constructed; or, if it so desires, the Erie Company may do such work and bill against the Cincinnati Company for the cost.”

Pursuant to said provisions, the contract was terminated. Thereafter the C. & E. Co. removed from its right of way the tracks of the C. B. & C. Co. in accordance with the terms of article 22. In removing said tracks and appropriating to its own use the road-bed and drainage the C. & E. Co. was acting strictly within its contractual rights. The evidence wholly fails to show that appellee did not use reasonable care in removing the tracks, or that any unnecessary injury was done to the material removed, and wholly fails to make a case of forcible entry. §8083 Burns 1914, §5237 R. S. 1881. The least that can be said is that by directing a verdict for appellee no injustice was done to appellant.

Judgment affirmed.

NOTE.—Reported in 119 N. E. 723.

RAMSEY v. YOUNT ET AL.

[No. 9,646. Filed October 31, 1918.]

1. **HUSBAND AND WIFE.—Rights of Wife in Estate of Deceased Husband.—Statutes.**—Under §§3027, 3029 Burns 1914, §§2489, 2491 R. S. 1881, where the husband dies, his widow takes a fee simple absolute in a third of all lands owned by him during the marriage in the conveyance of which she did not join, and this rule applies where the widow is a second or subsequent childless wife and there are children of a previous marriage. p. 381.
2. **HUSBAND AND WIFE.—Conveyance by Husband and Wife.—Validity.**—A husband may convey lands direct to his wife without the intervention of a third party, and such conveyances are valid in the absence of some legal reason for setting aside. p. 381.
3. **GIFTS.—Family Settlements.—Validity.**—Family settlements are valid when they are reasonable and the whole transaction has been free from fraud or undue influence. p. 382.
4. **DEEDS.—Acceptance.—Effect.—Estoppel.**—Where a grantee accepts a deed and takes possession of the real estate, he is bound by the conditions of the deed, since he will not be permitted to accept the beneficial provisions without accepting the burdens, and this rule applies to all estates legal or equitable, including dower. p. 382.
5. **STATUTES.—Construction.—Intent.**—In construing a statute according to the intent of the legislature, the court must make such application of the provisions thereof as will best promote its objects and in so doing the court is not always bound by the literal meaning of the words employed. p. 383.
6. **HUSBAND AND WIFE.—Conveyance by Husband and Wife.—Validity.—Statute.—Construction.**—Section 3029 Burns 1914, §2491 R. S. 1881, giving the wife one-third of all the realty owned by the husband during marriage in the conveyance of which she did not join, does not prevent the husband from conveying lands directly to his wife, the purpose of the statute being to protect her against conveyances to other parties which would defeat her rights as a widow. p. 383.
7. **HUSBAND AND WIFE.—Conveyance by Husband and Wife.—Acceptance.—Interest Acquired.**—Although §3029 Burns 1914, §2491 R. S. 1881, provides that a surviving wife shall be entitled to one-third of all the realty owned by the husband during marriage in the conveyance of which she did not join, where a second and subsequent wife accepts a deed of land made to her by her

Ramsey v. Yount—68 Ind. App. 378.

husband in which she did not join, whereby the husband deeded to her a life estate with the remainder to children of a former wife, she acquired only a life estate in all the land, and not the fee in one-third and the life estate in two-thirds. p. 384.

From Montgomery Circuit Court; *Jere West*, Judge.

Action by Ice H. Ramsey against Agnes R. Yount and others. From a judgment for defendants, the plaintiff appeals. *Affirmed*.

Albert D. Thomas, Michael E. Foley and Kennedy & Kennedy, for appellant.

Crane & McCabe, for appellees.

IBACH, J.—This is an action for partition. Appellant is the widow and was the third childless wife of Alexander F. Ramsey, deceased, who died on March 11, 1907. Decedent left two children by a former marriage, one a daughter, Hepsey B. Yount, and her three children, the appellees in this appeal, and who are the grandchildren mentioned in the deed in controversy. Such deed contains the following:

“This indenture witnesseth that Alexander F. Ramsey of Montgomery county, Indiana, conveys and warrants to Ice H. Ramsey, his wife
* * * for and during her natural life and at her death to descend share and share alike to the children of my daughter Hepsey B. Yount
* * * for the sum of one dollar, love and affection, the following real estate: (Describing it.)”

In her complaint appellant claims a fee-simple title to one-third of such lands under the statute, and a life estate in the remaining two-thirds thereof by virtue of the provisions of the deed.

To this complaint appellees filed answer, which contains substantially so much of the complaint as is hereinbefore set out, together with the following additional averments essential to a clear understanding of the questions involved: "Said deed was delivered by him (Alexander F. Ramsey) to the plaintiff on the — day of October, 1906, and the said deed was by the plaintiff filed for record on the 1st day of February, 1907. Upon the execution of said deed * * * she accepted the same and during the lifetime of Ramsey under and by virtue of said deed, took possession of said real estate by and through her agents and tenants and plaintiff has since leased said real estate and received the full and entire rents, profits and income thereupon. And since the death of said Ramsey, down to the commencement of this action plaintiff has continued to rent same, and she has collected rents therefrom as the same became due in the sum of \$14,175, and she has received the same by virtue of said deed. She has made repairs proper and necessary on the premises and has paid the taxes as the same accrued during said years, has insured the buildings, and paid the premiums therefor * * * and has asserted all the rights and privileges of full and absolute ownership of the premises from the day of the execution and delivery of the deed to her during the lifetime of said Ramsey down to the time of the commencement of this action. She has never disaffirmed or disclaimed, or renounced said deed and the rights and interest thereby conveyed to her, but has claimed to own and has held, used and occupied the same by virtue of said deed and under the terms and conditions thereof."

A demurrer to the answer for want of sufficient

facts to constitute a defense was overruled, and, plaintiff refusing to plead further, there was judgment for appellees. This action of the court is assigned as error and relied on for reversal.

It is contended by appellant that the facts revealed by the answer show that her husband had conveyed the lands in question by a deed in which she did not join, therefore, at his death she became absolutely seized of a one-third interest in such lands by virtue of §§3027, 3029 Burns 1914, §§2489, 2491 R. S. 1881. The further claim is also made that by the provisions of the deed she is entitled to a life estate in the remaining two-thirds of the lands described therein.

It will be conceded that under these statutes our courts have repeatedly held that on the death of a husband his widow takes a fee simple absolute

1. in a third of all lands owned by him during the marriage in the conveyance of which she did not join. *Fry v. Hare* (1906), 166 Ind. 415, 77 N. E. 803, and cases cited; *Wachstetter v. Johnson* (1916), 61 Ind. App. 659, 665, 108 N. E. 624. This is also true if such widow is a second or subsequent childless wife, although he may have children of a previous marriage. *Fry v. Hare, supra*.

It must also be conceded that a husband may convey lands direct to his wife without the intervention of some third party, and the same rules will be

2. applied to such conveyances as between parties where such relation does not exist; that is, they will be held valid until some legal reason has been shown for setting them aside.

The Supreme Court of this state, in disposing of a kindred question, has used this language: "Sup-

pose the husband and wife should have joined in a deed and conveyed the land to a third person and such third person conveyed the land to the wife, the legal title would have passed from the husband and wife and been received back by the wife. If they could convey title in that manner, as they surely could have done, there is no sound reason why, under our laws, they could not by agreement pass the title by deed direct from the husband to the wife, he executing and she accepting the conveyance. Such a deed is valid unless attacked for some cause other than that they were husband and wife at the time of the execution of such conveyance." *Enyeart v. Kepler* (1889), 118 Ind. 34, 39, 20 N. E. 539, 10 Am. St. 94.

Again, family settlements have been universally upheld in this state, when such settlements have

3. been found to be reasonable and the whole transaction has been free from fraud or undue influence.

The further rule is also well recognized that, where a grantee accepts a deed and takes possession of the real estate thereby conveyed, he is bound by

4. the conditions of the deed in like manner as if he had signed an agreement incorporating such conditions, for the reason that in equity he will not be permitted to accept alone the beneficial provisions of a will, deed or contract without at the same time accepting the burdens. He must either accept or reject the gift or conveyance as an entirety. These principles of equity apply to all estates legal or equitable, including dower and its substitute one-third in fee. 2 Story, Equity §1077; *Washburn v. Van Steenwyk* (1884), 32 Minn. 336, 20 N. W. 324; *Young v. Biehl* (1906), 166 Ind. 357, 77 N. E. 406; *Lindsley v.*

Patterson (1915), (Mo.) 177 S. W. 826, L. R. A. 1915F 680, 688.

In determining the sufficiency of the facts averred in the answer under consideration, we must also keep in mind the well-known rule that in seeking the

5. intention of the legislature, as evidenced by statute, we should endeavor as far as practicable to make such application of the provisions thereof as will best promote the objects of that enactment, and, as stated in a recent case: "We are not confined to the literal meaning of the words. A thing within the intention is regarded within the statute though not within the letter. A thing within the letter is not within the statute if not within the intention. When the intention can be gathered from the entire document, words may be modified or altered so as to obviate all inconsistency with such intention. When great inconvenience or absurd consequences will result from a particular construction the courts are bound to assume that such consequences are not intended." *People, ex rel. v. Crawley* (1916), 274 Ill. 139, 113 N. E. 119.

The evident purpose of the legislature in the enactment of the statutes relied upon by appellant was to protect the widow from conveyances by the

6. husband in which she did not join, and does not deal with conveyances made direct to her. In other words, the purpose of these statutes was not to prevent the husband from conveying lands direct to his wife, but to protect her against all conveyances made to other parties which would defeat her rights as a widow. As the childless third wife of Mr. Ramsey, in case he had died without executing the deed,

- appellant's interest would have been a life
7. estate in one-third of her husband's lands.

This deed gave her that interest, as well as a life interest in the remaining two-thirds in all the lands described, the fee passing to appellees, and having accepted the deed, knowing its full contents and the effect thereof, appellant must be held by its terms the same as if she had executed a deed with her husband, and the same interest and title had been conveyed to her from her husband through the intervention of a third party. The contention, therefore, cannot be sustained that the legal effect of the deed was to give her one-third of the lands in fee simple, and at the same time give to her a life estate in the remaining two-thirds.

Again applying the principles of equity which have been heretofore mentioned, we are satisfied that appellees' answer is sufficient to meet all the essential averments of the complaint.

“The doctrine of election is founded upon the principle that one cannot accept and reject under the same instrument. He must give effect to the whole intention of the donor, and not merely to provisions which are intended as beneficial to himself, and the donor is presumed to have intended that every part of the instrument of donation should take effect, as well as those portions which deprive the donee of an advantage as those which confer a benefit upon him. In other words, the benefit conferred has annexed to it, in accordance with the donor's presumed intention, the tacit condition that the donee will give full effect to the instrument of donation by relinquishing all rights which are inconsistent therewith. Some authorities, however, declare the doctrine to rest not

Vonnegut Hardware Co. v. Rose—68 Ind. App. 385.

upon presumed intention, but upon the equitable principle that he who seeks equity must do equity.” The above quotation from 11 Am. and Eng. Ency. Law 59, 60 is quite applicable to the question now before us. See, also, *Langley v. Mayhew* (1886), 107 Ind. 198, 203, 6 N. E. 317, 8 N. E. 157.

In the light of these authorities, our judgment leads us to conclude that the deed is authorized by law, and that its legal construction limits and confines appellant's rights to the terms and conditions of the grant.

Judgment affirmed.

NOTE.—Reported in 120 N. E. 618. Effect of conveyance from husband to wife, 69 L. R. A. 353, 21 Cyc 1285, 1288.

VONNEGUT HARDWARE COMPANY ET AL. v. ROSE ET AL.

[No. 10,320. Filed October 31, 1918.]

1. MASTER AND SERVANT.—*Workmen's Compensation Act.—Appeal.—Weighing Evidence.—Statutes.*—The amendment of the Workmen's Compensation Act (Acts 1915 p. 392, §8020l *et seq.* Burns' Supp. 1918) by the act of 1917 (Acts 1917 p. 154, §8020q2 *et seq.* Burns' Supp. 1918), which provides that an assignment of error that an award of the full board is contrary to law is sufficient to challenge the sufficiency of the facts found to sustain the award and the sufficiency of the evidence to sustain the finding of facts, does not give the Appellate Court authority to weigh evidence in reviewing an award by the Industrial Board, even where the member of the board who heard the evidence found for appellant, and the award appealed from was made by but two members of the board. p. 388.
2. MASTER AND SERVANT.—*Workmen's Compensation Act.—Appeal.—Review.—Conflicting Evidence.*—In a proceedings for compensation under the Workmen's Compensation Act (Acts 1915 p. 392, §8020l *et seq.* Burns' Supp. 1918), for the death of a servant, where the evidence as to the refusal of decedent and those acting for

him to permit an operation, as requested by the employer, was such misconduct as to deprive decedent's dependents of the benefits of the act was conflicting, but was clearly open to more than one inference by reasonable men, the determination of the Industrial Board with reference thereto is conclusive, since the question was one of fact. p. 391.

3. MASTER AND SERVANT.—*Workmen's Compensation Act.—Appeal.—Review.—Finding Based on Conflicting Evidence.*—On an appeal from an award of compensation under the Workmen's Compensation Act (Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918), for the death of a servant, where the evidence as to whether an autopsy was necessary to determine the cause of death and whether the demand therefor was made within a reasonable time was conflicting, the finding of the Industrial Board as to the necessity for an autopsy is conclusive on appeal. p. 392.
4. MASTER AND SERVANT.—*Workmen's Compensation Act.—Appeal.—Review.—Sufficiency of Evidence.*—In a proceedings for compensation under the Workmen's Compensation Act (Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918), for the death of a servant, evidence held sufficient to support the Industrial Board's finding that the strangulation of the intestines which caused decedent's death resulted from hernia, and that the hernia was caused by a strain resulting from the master's work. p. 393.

From the Industrial Board of Indiana.

Proceedings for compensation under the Workmen's Compensation Act by Lena D. Rose and another against the Vonnegut Hardware Company and others. From an award for applicants, the defendants appeal. *Affirmed.*

Joseph W. Hutchinson, for appellants.

Lehman & Faust, for appellees.

HOTTEL, J.—Appellees, Lena D. Rose and Georgia Rose, are respectively widow and daughter of Louis I. Rose, now deceased. On June 16, 1917, said Louis was alive and in the employ of appellant Vonnegut Hardware Company. On said day, while so employed and in the discharge of his duties connected therewith, he was taken sick, and so informed the foreman

under whom he was working. He thereupon went home. A few days later he was sent to the hospital. It there developed that he had hernia. He died on September 2, 1917. On February 2, 1918, appellees as the sole dependents of said deceased, filed with the Industrial Board their application in the usual form for compensation. A trial before Samuel R. Artman, a member of said board, on February 19, 1918, resulted in a finding and award for appellants. A review of the full board was had on March 28, 1918, which resulted in a finding and award by a majority of said board (said Artman not joining therein) in favor of appellees. This latter finding pertinent to the questions herein discussed is in substance as follows: On June 16, 1917, one Louis I. Rose was in the employment of appellant Vonnegut Hardware Company at an average weekly wage of \$10 as a general laborer or roustabout in said appellant's hardware store in the city of Indianapolis. Decedent's duties required him to keep the aisles clear, and to move the boxes and barrels out of the aisles when they were placed therein by others. On some occasions the boxes and barrels were extremely heavy. On June 16, 1917, while engaged in the discharge of his duties, decedent moved a barrel weighing about 125 pounds, and in moving said barrel accidentally ruptured himself, producing a right inguinal hernia. Decedent informed the foreman of his injury immediately after it occurred and went home. On June 19 following appellant provided decedent with an attending physician and, on June 27, caused him to be taken to the Methodist Hospital in said city, where he remained for about ten days, at the expiration of which he returned home, and later resumed his

work and worked for two weeks. At the expiration of two weeks, because of his disability resulting from his injury, decedent discontinued work, and soon thereafter was again taken to the hospital by his employer, where he died on September 2, 1917. On September 7, 1917, appellant made a written demand upon appellees for permission to exume the body of said decedent and hold an autopsy thereon, which demand was refused by appellee Lena D. Rose. Decedent left surviving him as his sole and only dependents the appellees who were living with him at the time of his injury and at the time of his death, and were wholly dependent upon him and were supported by him. From the date of his injury until his death, or eleven weeks, appellant paid decedent full wages, and during that period decedent earned wages for two weeks only. On June 16, 1917, appellant association was the insurance carrier of appellant company.

From the award rendered on this finding appellants appeal and assign as error that it is contrary to law. Under this assignment it is first con-

1. tended that said finding is not sustained by sufficient evidence, and in support of this contention it is insisted in effect that since the amendment of the Workmen's Compensation Act (Acts 1917 p. 155, §8020q2 *et seq.* Burns' Supp. 1918), which permits both the sufficiency of the facts found and the sufficiency of the evidence to sustain the finding to be challenged by an assignment of error that the award of the full board is contrary to law, this court is given authority to weigh the evidence; that in view of the fact that the member who heard the evidence found for appellants, and that the award from which the

appeal is prosecuted is made by the other two members alone, this court should exercise the discretion and power authorized by said amendment, weigh the evidence, and render judgment accordingly.

Appellants concede, and properly so, that prior to the passing of the amendment of 1917 this court had held that it had no power to weigh evidence. It is insisted, however, that said question has not been expressly passed upon by the court. As affecting this contention it is sufficient to say that there is nothing in said amendment of 1917 that can be said to indicate any intent on the part of the legislature to give to the appellate tribunal power to weigh evidence in such cases. The amendment clearly was intended merely to furnish a method of challenging the sufficiency of the evidence, the same as furnished by a like ground in a motion for new trial in the ordinary civil case. The courts had so long and so frequently held that a like reason in a motion for a new trial did not authorize the weighing of the evidence, but merely tendered to the appellate tribunal the question of whether there was any evidence to support each of the elements of the cause of action essential to recovery, that the legislature could not have been ignorant of such holdings, and must have intended a like meaning of the language used in said amendment. It is argued, however, that in any event the evidence fails to support the finding, in that it shows among other things that the appellants asked for an operation on decedent before his death, that such operation would in all probability have saved his life, and that such operation was refused by decedent and appellees. It is sufficient to say that the evidence on this branch of the case is conflicting. The physician furnished by

appellant testified that on Thursday before the deceased died on Sunday he told Mr. Rose that there was "no chance of him getting well in his present condition. The only thing was to operate. That was the only chance to save him was to do the operation and see where the bowel was strangulated." When asked if he made any statement concerning the operation to Mrs. Rose he answered: "Yes I did. They were there * * * They refused the operation." The widow denied the request testified to by Dr. Fosler, but said that Dr. Sowders told her on Thursday that he would like to have an operation; that she went over and waited until four o'clock, and Dr. Fosler did not come; that Dr. Sowder then told her on Saturday morning at the hospital that "he could not help my husband any more. That was (what) Dr. Sowders say, so what was the use of having an operation * * * I believe he knew what he said." The son testified that the only times anything was said to him about an operation was on two occasions: The first was at the doctor's office, when he told him in substance that his father had a very sore appendix; that he had no doubt but that he had appendicitis. This was the day before the point of rupture was discovered; that the following day he switched from what he said, and said that "he knew for a certainty—that in fact he did not have appendicitis; that the rupture had been discovered at the hospital, and that not the appendix was the trouble; that he would put a truss on for the rupture, that he would have no further trouble after he had reduced the present strangulation." The other conversation was with Dr. Fosler on Friday preceding the father's death on Sunday, and he then did not say that an

operation was necessary to save his life, but said he did not know whether it would save it. "He said that there was some chance but he could not say positive, but as he saw it he would probably die if he didn't have an operation and an operation might possibly pull him through although he would not recommend it, and he said he wanted to have authority—if he took a chance, because he said he didn't have such a good chance of coming through at all."

The better reasoned cases and the great weight of authority seem to be to the effect that the right of compensation under the workmen's compensation acts will be defeated by the refusal of the injured party or those representing him to submit to an operation in those cases only where the operation is not attended with substantial danger to life or health or extraordinary suffering, and where "according to the best medical or surgical opinion the operation offers a reasonable prospect of restoration or relief from the incapacity from which the workman is suffering." *Jendrus v. Detroit Steel Products Co.* (1913), 178 Mich. 265, 144 N. W. 563, L. R. A. 1916A 381, Ann. Cas. 1915D 476, and cases there collected and cited.

We have indicated enough of the evidence on this branch of the case to show that there is conflict therein. Some of it, at least, tended to show that

2. the operation contemplated was a dangerous one; that, if it was requested, the request came too late and at a time when the condition of decedent was such that recovery therefrom would have been doubtful and uncertain. Whether a refusal to permit the operation under such circumstances was such misconduct on the part of the decedent and those

acting for him as to deprive his dependents of the benefits of said compensation act under the authorities, *supra*, was clearly open to more than one inference by reasonable men, and hence was a question of fact which, when determined by the Industrial Board, cannot be disturbed by the appellate tribunal.

It is contended by appellants that appellees were not entitled to an award because they refused appel-

lants the benefits of an autopsy, and that such

3. examination of the body was necessary in this case to determine the cause of death. Here again there is conflict in the evidence on the question of the necessity therefor, and also on the question of the time of its demand. There was some evidence warranting the inference that there was no necessity for such autopsy, and, according to the testimony of both the mother and the son, there was no such demand made until Friday after the death of decedent. The decedent died on Sunday and was buried on the following Monday. Whether the refusal of a demand for an autopsy made after the burial of the workman will in any case deprive his dependents of their right to compensation under said act we need not determine. It is sufficient to say that a demand therefor should be made at a reasonable time and place. *Indianapolis Abattoir Co. v. Bryant* (1918), 67 Ind. App. 225, 119 N. E. 24; See, also, *Root v. London Guarantee, etc., Co.* (1904), 92 App. Div. 578, 86 N. Y. Supp. 1055, affirmed in 180 N. Y. 527, 72 N. E. 1150; *American Nat. Ins. Co. v. Nuckols* (1916), (Tex. Civ. App.) 187 S. W. 497. In this case the appellants knew of the death of Mr. Rose as soon as it occurred. A representative of the Vonnegut company called at the home of appellees the day before the burial. Un-

der these facts and the cases cited, *supra*, the finding of the Industrial Board on said question is conclusive on this court.

It is also claimed in effect that the evidence does not show that decedent's death was the result of any accident, and fails to show any connection be-

4. tween what decedent was doing on the morning he took sick and the strangulated intestine which caused his death. The evidence upon this branch of the case is not convincing, but we are unable to say that there was no evidence authorizing the inference drawn by the board. There was evidence showing that the work of decedent required him to keep the aisles clear in appellant Vonnegut's place of business; that to do this he was frequently required to move boxes and barrels, the latter sometimes weighing from 125 to 400 pounds. It was shown that on the day he took sick he moved one of these barrels. After doing this kind of work he went to his foreman and complained, and then was sent, or went, home. When he got home he complained of being sick, and said, "It hurts me inside." Later he told his foreman in substance that he was lifting a barrel on the morning he took sick and strained himself. After being in bed three days, a physician employed by the Vonnegut company was called. The physician ordered him to the hospital, where he remained ten days. The doctor first thought he had appendicitis, but later discovered the rupture. During his disability appellant Vonnegut company paid him his wages, and paid his hospital bills, and furnished him the services of a physician and surgeon. After leaving the hospital, he went back and attempted to work for the Vonnegut company, and after work-

ing two weeks took sick again, and was again sent to the hospital by said company's physician, Dr. Fosler. He was then sick until he died. The death certificate signed by Dr. Fosler gave the cause of death as strangulated intestines. Dr. Fosler testified that he could not tell what caused the bowels to strangulate. Other doctors, however, who saw decedent in the first part of his sickness, testified that in their opinion the strangulation was caused by the hernia. The evidence indicated is, we think, some evidence at least tending to support and authorize the finding of the board that the strangulation of the intestines which caused decedent's death resulted from hernia, and that the hernia was caused by the strain resulting from appellant's work of lifting on the morning he took sick, thus showing a continuous causal connection between the lifting and the death. In support of this conclusion, see *Puritan Bed Spring Co. v. Wolfe* (1918), ante 330, 120 N. E. 417, and cases cited; *Robbins v. Original Gas Engine Co.* (1916), 191 Mich. 122, 157 N. W. 437; *Madden's Case* (1916), 222 Mass. 487, 111 N. E. 379, L. R. A. 1916D 1000; *Retmier v. Cruse* (1918), 67 Ind. App. 192, 119 N. E. 32; *Cleverley v. Gas, etc., Co.* (1907), 1 B. W. C. C. 82; *Simpson Construction Co. v. Industrial Board* (1916), 275 Ill. 366, 114 N. E. 138; *Bloomington, etc., R. Co. v. Industrial Board* (1916), 276 Ill. 120, 114 N. E. 511.

For the reasons indicated, the award of the Industrial Board is affirmed, and five per cent. damages added, as provided by §3 of the amendment of 1917 to the Workmen's Compensation Act. Acts 1917 p. 154, *supra*.

NOTE.—Reported in 120 N. E. 608. Workmen's compensation: review of findings under act, L. R. A. 1916A 163, 266, L. R. A. 1917D 186.

Zoellers v. Loi, Admr.—68 Ind. App. 395.

ZOELLERS ET AL. v. LOI, ADMINISTRATOR.

[No. 9,644. Filed November 1, 1918.]

1. **PLEADING.**—*Complaint.*—*Demurrer.*—*Overruling.*—*Effect.*—In an action for a personal judgment and to have declared and enforced a vendor's lien, a demurrer was properly overruled, even though allegations seeking to establish the lien may have been insufficient, where the complaint disclosed that plaintiff was entitled to personal judgment. p. 397.
2. **EXECUTORS AND ADMINISTRATORS.**—*Contract to Support Decedent.*—*Breach.*—*Recovery by Administrator.*—*Scope.*—Where decedent conveyed a farm to his daughter for the sole consideration that she would care for and support him and at his decease afford him suitable burial, and she violated the agreement, so that a son was required to support decedent, the administrator of the latter's estate could recover a personal judgment against the daughter for the value of services rendered, and enforce his judgment by means of an equitable lien on the land. p. 397.
3. **APPEAL.**—*Review.*—*Evidence.*—*Insufficiency.*—*Necessity for New Trial.*—In an action to recover for support, care and services rendered decedent, where the evidence showed that certain services were rendered by a son for which he was entitled to recover but there was no proof as to the value thereof, so that the judgment for plaintiff was too large, the case should be remanded for a new trial rather than that a remittitur be ordered for the items not sustained by the evidence. p. 399.

From Clark Circuit Court; *James W. Fortune*, Judge.

Action by Frank Loi, administrator of the estate of Adam Loi, deceased, against Elizabeth Zoellers and others. From a judgment for plaintiff, the defendants appeal. *Reversed.*

Alexander Dowling, for appellants.

Zenor & McIntyre and *Jewett, Bulleit & Jewett*, for appellee.

CALDWELL, C. J.—Appellant Elizabeth Zoellers and Frank Loi, appellee, are sister and brother. The

latter is administrator of the estate of Adam Loi, their father. Appellant John Zoellers was named as a defendant, and also joins in the appeal, by reason of being the husband of Elizabeth. Elizabeth assigns error on the overruling of the demurrer to the complaint. The complaint alleges in substance that on April 28, 1908, Adam Loi, an aged and infirm widower, was the owner of a forty-acre farm in Floyd county, of the value of \$1,500; on that day he conveyed the farm to Elizabeth, the sole consideration as recited in the deed being her promise that she would care for and support her father in sickness and in health, and afford him suitable burial at his decease; that she accepted the conveyance, took possession of the farm and yet retains it; that she violated her agreement, and as a consequence such care and support and such interment were furnished and provided by others, whereby Adam Loi's estate is indebted as follows: To Dr. Leuthart, for medical attendance, \$20; to Frank Loi, who as administrator is appellee, \$209.75, based on board, care and nursing furnished by him, \$174, and the payment by him of certain debts contracted by decedent for barber and laundry service, and clothing and medicines bought, \$35.75; to Frank Kraft, funeral director, burial expenses, \$92, a total of \$321.75; that the claims of the doctor and the funeral director have been filed against the estate and allowed; that Frank's claim has been filed but, although valid, has not been allowed, for the reason that under the statute it may be allowed only by the court on proof; that under the facts Elizabeth is indebted to the estate in the sum of \$321.75; that decedent left no estate (aside from the claim involved in this action), except

personal property not exceeding \$50 in value; that, in addition to such farm, Elizabeth has no property, and that she is insolvent; that by reason of the facts there exists in favor of the estate a vendor's lien against the land. Prayer for judgment in the amount that Elizabeth is indebted to the estate, and that a lien be declared and enforced.

Appellants contend that the complaint in theory proceeds to the end that a vendor's lien may be declared and enforced against the farm; that it

1. is not sufficient on that theory or in its relation to any such lien, and that as a consequence the court erred in its ruling on the demurrer. Under our system of procedure, if the complaint discloses that the plaintiff is entitled to a personal judgment on the claim which he seeks to establish, the ruling on the demurrer was correct, regardless of its sufficiency in its relation to the alleged lien. *Miller v. Gates* (1916), 62 Ind. App. 37, 112 N. E. 538, and cases; *Howe v. Dibble* (1873), 45 Ind. 120.

We are of the opinion that the complaint states a cause of action not only for the recovery of a personal judgment against appellant Elizabeth,

2. but also for the enforcing of an equitable lien against the farm in the amount of such judgment and against both appellants. By reason of Elizabeth's failure to perform her agreement, it became necessary for her father to, and he did, incur indebtedness as alleged, and other indebtedness arose against his estate based on funeral expenses. We know of no good reason why the father in his lifetime might not have recovered from Elizabeth the reasonable amount of the indebtedness which he incurred by reason of her failure to perform her

agreement, or why the administrator of his estate may not likewise recover, including, also, the reasonable funeral charges. The persons who performed the services and furnished the supplies and necessities which Elizabeth should have performed and furnished will, of course, by reason of their claims against the estate, be the ultimate beneficiaries of any such recovery. They are entitled to proceed against the estate to recover such claims, but any such procedure on their part would be empty of results by reason of the estate's insolvency. Such fact would be sufficient in equity to authorize them to enforce their claims by proceeding against Elizabeth by reason of her obligation to the estate. Such a procedure, by reason of her alleged insolvency, would be of doubtful results. For each of them so to proceed would, moreover, result in multiplicity of actions. Elizabeth's obligation arose from a transaction wherein she procured the farm by virtue of assuming the obligation. The administrator is proceeding to create a fund to discharge debts of the estate for the payment of which Elizabeth, in equity, is primarily liable. Under such circumstances we conclude that, in view of the allegations of the complaint, the administrator, in behalf of the creditors, is entitled to proceed against Elizabeth to recover a personal judgment, and to have declared and enforced against the farm an equitable lien in the amount of such judgment. It follows that the court did not err in overruling the demurrer to the complaint. See the following: *Huffmond v. Bence, Admr.* (1891), 128 Ind. 131, 27 N. E. 347; *Clark v. Marlow* (1897), 149 Ind. 41, 48 N. E. 359; *Hamilton v. Barricklow* (1884), 96 Ind. 398; *Abbott v. Sanders* (1907),

Zoellers v. Loi, Admr.—68 Ind. App. 395.

80 Vt. 179, 66 Atl. 1032, 13 L. R. A. (N. S.) 725, and note, 12 Ann. Cas. 898; 37 Cyc 466, 467.

A trial of the cause resulted in a finding and judgment in appellee's favor for \$321.75 and in a decree declaring and ordering enforced a lien against

3. the farm. Appellants are correct in their contention that the amount of the recovery is too large. This results from the insufficiency of the evidence to sustain certain items of the claim sued on. Under the rule that governs in this court, the evidence is sufficient to sustain the decision so far as based on services performed by Dr. Leuthart, and by the funeral director, being \$20 and \$92 respectively, and also sums paid by Frank Loi for barber and laundry work, and medicines bought, aggregating \$35.50, or a total of \$147.50. There was evidence also that Frank Loi cared for decedent in the way of furnishing him board and care and attention when sick, and also certain clothing, but no evidence on the subject of the value of such service or of articles so furnished. It may be said also that there was an absence of evidence respecting the financial condition of the estate and also respecting Elizabeth's financial condition. As to the sufficiency of the evidence in other respects, we express no opinion. Under the circumstances, we conclude that justice demands a new trial rather than a remittitur. Other questions presented are not considered or decided.

Judgment reversed, with instructions to sustain the motion for a new trial as to each appellant, and for other proceedings not inconsistent with this opinion.

NOTE.—Reported in 120 N. E. 623.

PEDLOW v. SWARTZ ELECTRIC COMPANY.

[No. 10,306. Filed November 1, 1918.]

1. MASTER AND SERVANT.—*Workmen's Compensation Act.—Appeal.—Assignment of Error.—Questions Presented.*—Under §8020s2 Burns' Supp. 1918, Acts 1917 p. 154, the assignment of error on appeal that the award is contrary to law presents both the sufficiency of the facts found to sustain the award and the sufficiency of the evidence to sustain the finding of facts. p. 404.
2. MASTER AND SERVANT.—*Workmen's Compensation Act.—Appeal.—Findings of Board.—Conclusiveness.*—Where there is some evidence to sustain a finding of the Industrial Board in a proceedings under the Workmen's Compensation Act, Acts 1915 p. 392, §8020l et seq. Burns' Supp. 1918, it will not be disturbed on appeal. p. 404.
3. MASTER AND SERVANT.—*Workmen's Compensation Act.—Agreement for Compensation.—Effect.*—Under §57 of the Workmen's Compensation Act, Acts 1915 p. 392, §8020l et seq. Burns' Supp. 1918, an agreement for compensation between an injured servant and the employer which has been approved by the Industrial Board, has the full force and effect of an award. p. 405.
4. MASTER AND SERVANT.—*Workmen's Compensation Act.—Award.—Conclusiveness.*—An award of compensation under the Workmen's Compensation Act, Acts 1915 p. 392, §8020l et seq. Burns' Supp. 1918, not reviewed or set aside, is conclusive on both parties, except as provided in §45 of the act, authorizing a review because of change of condition arising after the making of an award. p. 405.
5. MASTER AND SERVANT.—*Workmen's Compensation Act.—Award.—Application for Modification.—Scope of Review.*—In a hearing under §45 of the Workmen's Compensation Act, Acts 1915 p. 392, §8020l et seq. Burns' Supp. 1918, for modification of an award because of a change in condition, the parties are bound by the proof made at the former hearing, and proof is limited to evidence tending to prove or disprove the contention that the conditions existing at the time of the award have subsequently changed. p. 405.

From the Industrial Board of Indiana.

Proceedings for compensation under the Workmen's Compensation Act by James L. Pedlow against the Swartz Electric Company. From the award rendered, the applicant appeals. *Affirmed.*

J. L. Steinmetz, for appellant.

Elmer E. Stevenson, for appellee.

FELT, P. J.—This is an appeal from an award of the full Industrial Board of Indiana. Appellant has assigned as error that: (1) The award is contrary to law; (2) that the full board erred in awarding appellant two weeks' compensation.

Appellant, in his brief, states that: "The action was an application by appellant, against appellee, for a review of an award of the Industrial Board of Indiana on account of a change in condition; that the disability of appellant, on account of said injury, had increased since the date of said award, and that the previous award be increased."

On January 16, 1918, the date of the hearing before Samuel R. Artman, one of the members of the Industrial Board, appellant filed what he denominated "an application for the review of an award on account of a change in condition," in which he alleges that appellant's disability on account of his original injury "has recurred since the date of said award"; that the same "has increased since the date of said award." Appellant was awarded two weeks' compensation at the rate of \$13.20 per week, to be paid in a lump sum.

He thereupon applied for a review of such award, and, after a hearing by the full board, it made a finding and award, which, omitting uncontroverted details, is in substance as follows: Appellant was employed by appellee at \$24 per week, and while so employed received an injury to the middle finger of his right hand, which became infected, and by reason of which he was totally disabled for the period of four and three-sevenths weeks from May 1, 1917.

“That on the 14th day of June 1917 the plaintiff and defendant entered into a compensation agreement whereby it was agreed that the plaintiff's injury was occasioned by an accident arising out of and in the course of his employment; that the defendant should pay to the plaintiff and the plaintiff should accept, compensation at the rate of \$13.20 per week, beginning May 15, 1917, together with the costs of the proper medical and hospital attention occasioned by his injury, for the first thirty days thereafter; that the compensation payments should continue at said rate so long as the plaintiff was totally disabled for work on account of said injury; that said agreement was filed with the Industrial Board of Indiana on June 19, 1917, and was approved by said board on June 20, 1917; that on the 2nd day of August, 1917, the plaintiff and defendant entered into a supplemental compensation agreement whereby it was agreed that the permanent partial impairment of the plaintiff's middle finger was twenty-five per cent.; that there had been paid to the plaintiff under the previous compensation agreement, two and three-sevenths weeks' compensation amounting to \$30.17; that there was due and unpaid to the plaintiff, on account of the permanent partial impairment of the middle finger, compensation for five weeks, one and one-half days additional, amounting to \$68.83, and making a total compensation of seven and one-half weeks amounting to \$99.00; that said agreement was to be filed with the Industrial Board of Indiana as a supplemental final agreement; that said supplemental and final agreement was filed with the Industrial Board of Indiana on August 4, 1917, and was approved by the board on August 6, 1917; that pursuant to

said agreement the defendant paid to the plaintiff the additional \$68.83 and took his receipt therefor, in which it was stipulated 'It is hereby understood and agreed that there is a twenty-five per cent. permanent partial impairment of the middle finger of the plaintiff's right hand,' which receipt was filed with the Industrial Board of Indiana on the 4th of August, 1917; that the plaintiff, as a result of his accident of April 27, 1917, received no injury except to the middle finger of his right hand; that the infection thereof did not extend to any other portion of the plaintiff's body than the middle finger of the right hand and did not cause any permanent partial impairment to any other member of the plaintiff's body; that in the early part of September, 1917, the plaintiff's middle finger became inflamed by reason of a recurrence of the infection thereof; that the plaintiff immediately notified the defendant who sent him to an attending physician, who treated said finger, and as a result of that treatment it healed within the course of three or four days; that as a result of the return of said infection the plaintiff was disabled for work for a period of two weeks; that the recurrence of said infection did not aggravate, change or increase the degree of permanent partial impairment of said finger."

"Award.

"It is therefore considered and ordered by the full board that the plaintiff be and is hereby awarded two weeks' compensation at the rate of \$13.20 per week, to be paid in cash in a lump sum, on account of a disability to work occasioned by the recurrence of the infection in his middle finger of the right hand in Sept. 1917."

Appellant cites and relies on the provisions of §31 of the Workmen's Compensation Act, Acts 1915 p. 392, §8020c1 Burns' Supp. 1918, and §45 of the act, being §8020c2 of the aforesaid statutes. The provision of §31 so relied upon states that: "In all other cases of permanent partial disability, including any disfigurement which may impair the future usefulness or opportunities of the injured employe, compensation * * * shall be paid when and in the amount determined by the Industrial Board, not to exceed fifty-five per cent. of average weekly wages per week for a period of two hundred weeks." Section 45 of the act authorizes a review by the Industrial Board "on the ground of a change in condition" arising after the award was made.

Appellant, in effect, contends that the board, having found that he was entitled to some additional compensation, committed an error of law in limiting the same to two weeks, because the "evidence warrants a larger award than two weeks' compensation at \$13.20 a week."

The assignment that the award is contrary to law presents "both the sufficiency of the facts

1. found to sustain the award and the sufficiency of the evidence to sustain the finding of facts."

§8020s2 Burns' Supp. 1918.

The finding clearly authorizes and sustains the decision and award of the full board. The evidence at least tends to sustain the finding. There

2. being some evidence to sustain the finding, the action of the board in that regard will not be disturbed on appeal. *Interstate Iron, etc., Co. v. Szot* (1916), 64 Ind. App. 173, 115 N. E. 599.

The agreement by the parties made on August 2,

Pedlow v. Swartz Electric Co.—68 Ind. App. 400.

1917, and approved by the board on August 6, has the full force and effect of an award. §57,

3. *supra*; §8020c2 Burns' Supp. 1918, *supra*; *In re Stone* (1917), 66 Ind. App. 38, 117 N. E. 669.

The award so made has not been reviewed or set aside. It is therefore final and conclusive upon both parties, except as provided in §45 of the act,

4. *supra*. In a hearing based on the provisions of such section the original award stands as an adjudication upon all matters in dispute up to the time such award was made, and neither party may thereafter be heard to say that such award was wrong in any respect, or that in any subsequent hearing evidence is proper to show that either the injury or disability was greater or less than that indicated by such award.

In a hearing under the provisions of §45 of the act, *supra*, the parties are bound by the proof made at the former hearing, upon which the finding was

5. based and the award made, and the proof is limited to evidence tending to prove or disprove the contention that the conditions existing at the time the award was made have changed subsequently to the making thereof. *Bloomington, etc., R. Co. v. Industrial Board* (1916), 276 Ill. 120, 114 N. E. 511; *Simpson Construction Co. v. Industrial Board* (1916), 275 Ill. 366, 114 N. E. 138; *City of Pana v. Industrial Board* (1917), 279 Ill. 279, 116 N. E. 647.

The award of August 6 is unaffected by the subsequent proceedings. If the questions appellant seeks to present relate to the award of August 6, they are unavailing, because they are *res ad judicata*, as above shown.

If the proposition relied on for reversal is the contention that the allowance of two weeks' compensation by the full board for the recurring injury and the additional disability occasioned thereby is too small, appellant cannot succeed, for the evidence sustains the findings, and the award of two weeks' compensation made by the full board is fully authorized by such findings.

No error is presented, and the award of the full Industrial Board is therefore affirmed.

NOTE.—Reported in 120 N. E. 603. Workmen's compensation: review of findings on appeal, L. R. A. 1916A 266, L. R. A. 1917D 186.

NOBLE COUNTY BANK v. DEPEW ET AL.

[No. 9,612. Filed November 1, 1918.]

1. *APPEAL.—Review.—Waiver of Error.*—Alleged error in the admission of evidence is waived by the failure of appellant, in its statement of the record, to point out the page and line of the transcript at which the rulings complained of may be found. p. 408.
2. *APPEAL.—Briefs.—Abstract Propositions of Law.—Questions Presented.*—A proposition in appellant's points and authorities in reference to instructions which is not directed to any particular instruction cannot be aided by reference to appellant's argument and presents no question for review. p. 408.
3. *BILLS AND NOTES.—Bona Fide Owner.—Evidence.*—In an action by assignee bank on a note embodying a conditional contract of sale of live stock under which the payee of the note, or holder thereof, might retake and sell the live stock on failure to pay when due, evidence showing that, on default in payment, the payee retook and sold the cattle for which the instrument was given and entered credit on the note at the bank, and that the bank cashier or his assistant informed defendant's attorney in response to an inquiry about the note that he must see the payee, as the bank had nothing to do with the instrument, was sufficient

Noble County Bank v. DePew—68 Ind. App. 406.

to warrant the inference that the bank was not the *bona fide* owner of the note. p. 408.

From De Kalb Circuit Court; Dan M. Link, Judge.

Action by the Noble County Bank against Frank DePew and another. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

T. A. Redmond and R. S. Emerick, for appellant.
Edgar W. Atkinson, for appellees.

HOTTEL, J.—This action was instituted by appellant to recover on a certain promissory note alleged to have been executed by appellees to the order of Whitford Brothers, and thereafter assigned and transferred to appellant by a proper indorsement in writing. Appellees' answer, in four paragraphs, includes: (1) A general denial; (2) a plea of payment; (3) a defense that appellant is not, and never was, the *bona fide* owner of the note in question, and that; subsequently to its maturity, appellees paid and settled the note with one of the Whitford brothers, its real owners; and (4) a plea of estoppel based on certain statements alleged to have been made by one of appellant's representatives, which will later appear from our discussion of the evidence. A trial by jury resulted in a verdict for appellees, and, from the judgment thereon, this appeal is prosecuted. The sole error assigned challenges the action of the circuit court in overruling appellant's motion for a new trial, but most of the specifications contained in that motion are so presented as not to require extended treatment.

Various rulings on the admission of evidence are complained of, but, in its statement of the record, ap-

pellant has failed to point out the page and
1. line of the transcript at which any of said rulings may be found, and their consideration is therefore waived. *Inland Steel Co. v. Smith* (1906), 168 Ind. 245, 252, 80 N. E. 538; *Smith v. Toth* (1916), 61 Ind. App. 42, 50, 111 N. E. 442.

Complaint is also made, in argument, of certain instructions which were given to the jury, but no reference is made thereto in appellant's state-

2. ment of their points and authorities, except in the abstract assertion that: "It was the duty of the court to instruct the jury as to the theory of the cause of action as well as of the theory of defense, and when the respective theories were once stated, the instructions should have been upon the same theories." This proposition, which is not directed to any particular instruction, cannot be aided by reference to appellant's argument, and presents no question for review. *Chicago, etc., R. Co. v. Dinius* (1913), 180 Ind. 596, 626, 103 N. E. 652; *American, etc., Tin Plate Co. v. Yonan* (1915), 59 Ind. App. 700, 703, 109 N. E. 922; *Moore v. Ohl* (1917), 65 Ind. App. 691, 116 N. E. 9, 11.

The only remaining question is presented by appellant's contention that the evidence does not sustain the verdict of the jury. The instrument in suit

3. was executed by appellees in payment for certain live stock purchased by them from Whitford Brothers under a conditional sale contract, embodied in the note, in which it was agreed that, on failure to pay the claim when due, the payee of the note, or the holder thereof, might take possession of and sell said live stock, and apply the proceeds of the sale on the original obligation. There is some evi-

dence tending to show that this note was duly sold and assigned to appellant before maturity, and appellants assert that the verdict of the jury must therefore rest on either the second or fourth paragraph of appellees' answer. In making this assertion, however, appellant overlooks the probative force of certain circumstances from which the jury may have drawn the inference that the note in suit was left with appellant for collection, and that title thereto remained in the original payees.

One of the Whitford brothers testified that, after the note became due, and was unpaid, he exercised the option given in the sale contract to retake and sell the live stock for which the instrument was given, and then entered a credit on the note at the bank. This witness expressly testified that he "took up the cattle as consideration or pay for the note." There is also evidence to the effect that one of the agents of the bank, either the cashier or the assistant cashier, told appellees' attorney, in response to an inquiry concerning the note, that he must see Mr. Whitford, as they (the bank) had nothing to do with the instrument. The latter statement is made the basis of appellees' fourth paragraph of answer, and appellant contends that this proof is insufficient to establish the defense of estoppel, since it does not appear that appellees in any way acted on said statement to their loss. Conceding this contention, the evidence still has a bearing on the issue of ownership, and may have been so considered by the jury. It also appears that Whitford Brothers, although residents of the county in which appellant bank is situated, were not made defendants to the action as indorsers on the note. These circumstances are open to different inter-

pretations, but the jury has evidently drawn the inference that, to avoid certain defenses against the note in the hands of its original owners, appellant instituted this action on their behalf. The proof, as a whole, is not satisfactory, but we are unable to say that there is no evidence which tends to sustain the third paragraph of appellees' answer, and its weight was determined in the trial court.

Judgment affirmed.

NOTE.—Reported in 120 N. E. 605.

BRUMBAUGH v. MELLINGER.

[No. 2,604. Filed November 7, 1918.]

1. *APPEAL.—Waiver of Error.—Briefs.*—Questions not presented in the propositions and points in appellant's briefs are waived. p. 413.
2. *BILLS AND NOTES.—Burden of Proof.—Fraud or Illegality.*—Where fraud in the procurement of a note is set up as a defense in a suit thereon by an indorsee, the burden is on the plaintiff to show his protection from such defense as a good-faith purchaser for value before the maturity of the note. p. 413.
3. *APPEAL.—Review.—Instruction Misplacing Burden of Proof.—When Harmless.*—The giving of an instruction which places the burden of an issue on the wrong party is generally reversible error, but a judgment will not be reversed for such error where the record affirmatively shows that it was harmless. p. 414.
4. *SALES.—Sales Induced by Fraud.—Remedies of Purchaser.—Avoidance.*—A sale of property induced by fraud is not void, but only voidable at the election of the purchaser, the title, in such a sale, passing to the purchaser, and so remaining, unless he rescinds. p. 414.
5. *SALES.—Sale Induced by Fraud.—Rescission.—Restoration of Property.*—If a defrauded buyer elects to rescind the contract of sale, he must make a complete restoration of everything of value received under the contract. p. 415.
6. *CORPORATIONS.—Sale of Stock.—Action on Purchase Note.—Defense of Fraud.—Restoration of Stock.*—In an action on a note

Brumbaugh v. Mellinger—68 Ind. App. 410.

given for the purchase price of corporate stock, defendant, in the absence of an offer to restore the stock, could not prevail on the ground of fraud inducing the purchase unless the stock was worthless at the time he bought it. p. 415.

7. *APPEAL.—Review.—Harmless Error.—Instructions.—Misplacing Burden of Proof.*—In an action on a note given for corporate stock, where defendant made no offer to restore the stock, and the evidence showed that it had a substantial value when purchased, a finding against him on his answer of fraud in the procurement of the note was right, so that an instruction improperly placing the burden of proof on the issue upon him was harmless. p. 415.

8. *CORPORATIONS.—Stock Certificates.—Failure to Deliver.—Restoration of Stock.*—Certificates of corporate stock are not the stock and do not constitute the title thereto, but are merely evidence of a purchaser's title, so that, in an action on a note given for corporate stocks, the purchaser was bound to make restoration to avoid payment of the note for fraud, even though he had never received the certificate. p. 416.

From Elkhart Circuit Court; *James S. Drake*, Judge.

Action by John C. Mellinger against Frank Brumbaugh and others. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

*Edward B. Zigler and Van Fleet, Hubbell & Din-
nen*, for appellants.

Dausman & Dausman, for appellee.

BATMAN, J.—This is an action by appellee against appellant Brumbaugh on a promissory note, payable to Goshen Concrete Tile Manufacturing Company, and assigned to appellee. Appellant filed an answer in four paragraphs. The first was a general denial. The second alleged that the note was given without consideration, and that appellee accepted the same after maturity, with full knowledge of such fact. The third is a plea of payment. The fourth alleges in substance, among other things, that the note was

given in payment of the purchase price of ten shares of stock in the above-named company, which was a corporation duly organized and existing under the laws of the State of Indiana, and doing business in the city of Goshen in said state; that he purchased said stock of said company through one Miller, who accepted said note in payment of the purchase price thereof; that said Miller was in charge of the business of said company, and that, at the time of the execution of said note, both he and appellee were familiar with the financial standing of said company; that, in order to induce him to purchase said stock and execute said note, the said Miller represented to him that the stock of said company was worth par, and that dividends were being paid thereon at the rate of six per cent. per annum; that he had no knowledge of the value of said stock, and no means of ascertaining such knowledge except through said Miller; that he executed said note, relying solely upon the representations of said Miller; that he has since learned that said representations were fraudulent and untrue; that said stock was not paying a dividend of six per cent. per annum, or in fact any dividend; that at the time of the execution of said note said company was insolvent, and its stock was worthless; that appellee accepted said note from said company, knowing all the representations made to him by said Miller, and that said note was not indorsed and delivered to appellee by said company until after its maturity; that said company is now in the hands of a receiver, and its liabilities are far in excess of its assets. To each of said affirmative paragraphs of answer appellee filed a reply in general denial. Appellant Aaron S. Zook, assignee of the Goshen

Concrete Tile Manufacturing Company, was made a party on his own motion, and tendered an issue as to its ownership of the note, which was met by a general denial on the part of appellee. The cause was submitted to a jury for trial, resulting in a verdict for appellee, on which judgment was rendered. Appellant Brumbaugh filed a motion for a new trial, alleging that the verdict is not sustained by sufficient evidence and is contrary to law; and that the court erred in giving to the jury, on its own motion, instructions Nos. 1 to 8 inclusive, and each of them. This motion was overruled, and appellant Brumbaugh has assigned this action of the court as the sole error on which he relies. The remaining appellant has not assigned errors.

The only question presented by appellant Brumbaugh in his propositions and points relates to the action of the court in giving instruction No. 4

1. on its own motion. All other questions are therefore waived, and will not be considered.

Chesapeake, etc., R. Co. v. Jordan (1916), 63 Ind. App. 365, 114 N. E. 461; *Continental Ins. Co. v. Bair* (1917), 65 Ind. App. 502, 114 N. E. 763, 116 N. E. 752.

Said instruction No. 4, given by the court on its own motion, is in part as follows: "It is also claimed in this fourth answer that the stock

2. was entirely worthless, and that Mr. Mellinger bought the note knowing that Miller had made a false representation in regard to the payment of dividends at the time he bought the note. So that the burden is on the defendant to prove by the preponderance of the evidence not only that Miller made false representation, but that Mr. Mellinger when he

bought the note knew of the false representation, or that he bought the note after maturity, because it is alleged that it was bought after maturity.”

Appellant contends that, where fraud in the procurement of a note is set up as a defense to the same in a suit by an indorsee, the burden is on the plaintiff to show his protection from such defense as a good-faith purchaser for value, before the maturity of the note; that this instruction violates this rule, and its giving was therefore error. In this contention appellant is fully sustained by the authorities. *Bright Nat. Bank v. Hartman* (1916), 61 Ind. App. 440, 109 N. E. 846, and cases there cited. But appellee contends that the giving of said instruction, if

3. error, was harmless. It is well settled that, as a general rule, the giving of an instruction which places the burden of an issue on the wrong party is reversible error. *Johnson v. Samuels* (1917), 186 Ind. 56, 114 N. E. 977; *Indianapolis, etc., Traction Co. v. Sherry* (1917), 65 Ind. App. 1, 116 N. E. 594. This general rule, however, yields to the exception that, where the record affirmatively shows that such error was harmless, the judgment will not be reversed. *Abelman v. Haehnel* (1914), 57 Ind. App. 15, 103 N. E. 869; *Evansville, etc., R. Co. v. Scott* (1916), 67 Ind. App. 121, 114 N. E. 649; *City of Decatur v. Eady* (1917), 186 Ind. 205, 115 N. E. 577, L. R. A. 1917E 242.

In this case we may accept as established facts that the note in suit was executed by appellant, as part payment for certain corporation stock;

4. that it has never been paid; and that \$75 is a reasonable attorney's fee for collecting the same. With these facts settled, only the questions

relating to the alleged fraud in the procurement of the note, and a want of consideration therefor, remain. As affecting the former question, it should be borne in mind that a sale of property induced by fraud is not void, but only voidable at the election of the party defrauded. In such a sale the title to the property passes to the purchaser and so remains, unless he rescinds the contract by which the sale is made. If he elects to rescind, he must make a complete restoration of everything of value he

5. has received under the contract, as the law will not permit him to undo the same, while retaining anything of value which he has received thereunder. *Citizens' St. R. Co. v. Horton* (1897), 18 Ind. App. 335, 48 N. E. 22; *Jarrett v. Cauldwell* (1911), 47 Ind. App. 478, 94 N. E. 790; *Barnard v. First Nat. Bank* (1916), 61 Ind. App. 634, 111 N. E. 451; *Home Ins. Co. v. Howard* (1887), 111 Ind. 544, 13 N. E. 103; *Thompson v. Peck* (1888), 115 Ind. 512, 18 N. E. 16, 1 L. R. A. 201; *Adam, etc., Co. v. Stewart* (1902), 157 Ind. 678, 61 N. E. 1002, 87 Am. St. 240.

In this case the evidence shows that the note in suit represents the purchase price of certain corporation stock, but there is no evidence that appellant

6. has made, or offered to make, restoration thereof. Under these circumstances, appellant could not prevail in this action on the
7. ground of fraud, however gross it may have been, unless there was evidence that the stock was worthless at the time he purchased the same, as he has alleged. The uncontradicted evidence in this regard shows that, at the time appellant purchased the stock in question, the company had outstanding 182 shares of stock of the par value of \$50 each; that

it had real estate of the value of \$2,000, machinery of the value of \$1,500, and merchandise, cash, bills and accounts receivable amounting to \$1,931.58; that its liabilities consisted of bills and accounts payable, amounting to \$2,300.89, leaving net assets amounting to \$3,130.69. There was also evidence that the stock was worth par in the market when the sale was made to appellant. It thus appears as an established fact that the stock was not worthless when appellant purchased the same, but had a substantial value. This being true, a finding against appellant on his answer of fraud was right, in the absence of evidence of restoration. Under these circumstances, the giving of instruction No. 4, although error, was harmless, as appellant, under the evidence, would not have been entitled to recover on the issue tendered by said answer, if a correct instruction on the question involved had been given.

The fact that the evidence was conflicting as to whether appellant ever received the certificates, representing the stock he had purchased, does not

8. change the situation. The certificates were not the stock, nor did they constitute title thereto. They were only evidence of appellant's title to the stock he had acquired, and, while they were convenient for such purpose, they were not indispensable. *Indianapolis, etc., R. Co. v. Meek* (1858), 10 Ind. 502; *Hill v. Kerstetter* (1909), 43 Ind. App. 1, 86 N. E. 858; *Galbraith v. McDonald* (1913), 123 Minn. 208, 143 N. W. 353, Ann. Cas. 1915A 420, L. R. A. 1915A 464; *Yeaman v. Galveston City Co.* (1914), 106 Tex. 389, 167 S. W. 710, Ann. Cas. 1917E 191, and note. The undisputed evidence shows that certificates evidencing the stock in question had

Commercial, etc., Bank Co. v. Citizens Nat. Bank—68 Ind. App. 417.

been mailed to appellant. Whether he had actually received them does not determine his title to the stock, and hence is not a matter of controlling importance. The fact that they were not in his actual possession, so that he could make a physical surrender of them, did not relieve him of the necessity of taking such steps as would be effective in making the required restoration, if he desired to avoid payment of his note on the ground of fraud.

It is evident from what we have said with reference to the value of the stock, at the time appellant purchased the same, that his answer of want of consideration was not sustained. We find no error in the record. Judgment affirmed.

Dausman, J., not participating.

NOTE.—Reported in 120 N. E. 676. Corporations: necessity of issuance or tender of stock certificate to render subscriber liable as a stockholder, L. R. A. 1915A 465; effect of inability to restore to *statu quo* on right to rescind stock subscription for fraud, 33 L. R. A. 725. See under (4) 35 Cyc 63; (5) 35 Cyc 146; (6, 8) 14 C. J. 478, 698.

COMMERCIAL AND SAVINGS BANK COMPANY v. CITIZENS NATIONAL BANK.

[No. 9,658. Filed November 8, 1918.]

1. **BANKS AND BANKING.**—*Forged Check.*—*Payment to Bona Fide Holder.*—*Recovery.*—Where a check purporting to have been drawn by a depositor is presented to a bank by a *bona fide* holder for value and without fault, and is paid by the bank, it cannot, if it subsequently discovers that the check is forged, recover the payment so made. p. 423.
2. **BANKS AND BANKING.**—*Forged Check.*—*Collection by Bank.*—*Rights Between Banks.*—Where a check was presented to a bank for payment by a stranger, and the bank, though not actually paying the check stamped "Paid" on the face thereof, and on the

VOL. 68—27.

Commercial, etc., Bank Co. v. Citizens Nat. Bank—68 Ind. App. 417.

back "Pay any Bank or Banker. All previous endorsements guaranteed," attaching a slip, "We enclose for collection and return," and sent the check to drawee bank which paid it, and, subsequently after the forwarding bank had paid the proceeds to its customer, the drawee discovered that the depositor's signature and indorsement were forged, the drawee bank could not recover the proceeds of the check from the forwarding bank, since the negligence of both banks contributed to the loss and, in such a case, the loss will be allowed to remain where it has been placed by the course of business. p. 437.

From Johnson Circuit Court; *William Deupree*, Judge.

Action by the Commercial and Savings Bank Company of Bellefontaine, Ohio, against the Citizens' National Bank of Franklin, Indiana. From a judgment for defendant, the plaintiff appeals. *Affirmed*.

Miller, Barnett & Barnett, for appellant.

White & Owens, for appellee.

FELT, P. J.—Appellant, the Commercial and Savings Bank of Bellefontaine, Ohio, brought this suit against appellee, the Citizens' National Bank, of Franklin, Indiana, to recover the amount paid by it to appellee on an alleged forged check.

The complaint was in four paragraphs, to which an answer was filed in six paragraphs.

Demurrers for insufficiency of facts alleged to state a cause of action were filed and overruled to each paragraph of the complaint. Demurrers for insufficiency of the facts alleged to constitute a defense to the cause of action stated in the complaint were filed to each paragraph of the answer, except the first, which was a general denial. Each of such demurrers were also overruled. Replies in general denial were filed to each paragraph of the special answers.

Commercial, etc., Bank Co. v. Citizens Nat. Bank—68 Ind. App. 417.

The parties made an agreement as to the evidence in the case. The court found for appellee and rendered judgment accordingly.

Appellant's motion for a new trial was overruled, and it has assigned as errors relied on for reversal (1) the overruling of the demurrer to the second, third, fourth, fifth and sixth paragraphs of answer and (2) the overruling of the motion for a new trial. A new trial was asked on the ground that the decision is not sustained by sufficient evidence and that such decision is contrary to law.

Appellee contends that no question is duly presented by appellant's brief under the rules of the court, because the pleadings are not set out in accordance with such rules, and because under points and authorities only abstract propositions of law are stated without being specifically applied to any particular question presented by the record.

The briefs are subject to criticism, but, considering them in their entirety, we are able to ascertain the principal questions presented by the issues and relied on for reversal, as they arise under the motion for a new trial, and shall consider the same from the standpoint of the sufficiency of the evidence to sustain the finding and judgment of the court.

The substance of the evidence, as far as material, is as follows: Appellant was a banking corporation doing business in the State of Ohio, and appellee was a similar corporation doing business in the State of Indiana. On October 11, 1912, appellant received from appellee, through the United States mail, a check, which was as follows:

“Bellefontaine, Ohio, Sept. 29, 1912.

“The Commercial & Savings Bank Co.

“Pay to the order of Myself \$320.00
Three hundred and twenty Dollars.

“W. H. Kellison.”

The check was stamped on the face as paid by appellant on October 11, 1912, and was indorsed on the back “W. H. Kellison,” and, also—

“Pay Any Bank or Banker. All previous endorsements guaranteed.

“Citizens’ National Bank, Franklin, Indiana.

“J. H. Tarlton, Cashier.”

That appellee sent with the check to appellant a slip reading as follows:

“The Citizens’ National Bank

Franklin, Indiana, Oct. 10, 1912.

“Commercial & Savings Bank Co.

Bellefontaine, Ohio.

“We enclose for collection and return, Items marked X no protest.

Report by number.

No. on Amount.

X You \$320.00

Respectfully,

O. C. Dunn, Cashier.”

The name of “W. H. Kellison” as maker and indorser of said check was a forgery. Appellant, relying upon the guaranty of appellee, did on October 11, 1912, pay appellee the amount of said check, less its charges of thirty cents, but at that time had no notice that the check had been forged, or that the indorsement by Kellison was a forgery, and in paying the same relied wholly upon the indorsement of appellee. On October 16, 1912, appellant first discov-

Commercial, etc., Bank Co. *v.* Citizens Nat. Bank—68 Ind. App. 417.

ered that said check was a forgery, and thereupon notified appellee by mail of that fact, and requested the return of the money. On October 19, 1912, appellant again communicated with appellee by mail, in which reference is made to a conversation over the telephone, and mention is made that the letter of October 16 did not reach appellee. In the letter dated October 19, it is stated that the check had been forged by a negro who was then in jail at Anderson, Indiana. Appellant also inclosed the check and asked appellee to remit the amount previously received from appellant in payment thereof. On October 22, 1912, appellee returned the check by mail to appellant, and informed the latter that the check had been presented to it for payment; that the bank refused to pay the same, but took it for collection; that the check was thereupon sent direct to appellant for collection, was accepted by it as genuine, and a draft was sent appellee for the amount, less charges for collection; that it is "presumed a banker knows the genuineness of his customers' checks before payment and we disclaim any further responsibility in the matter."

The agreement as to the evidence further shows that on October 10, 1912, a negro, who was a stranger to appellee, presented the check to the bank at Franklin, Indiana, for payment, and payment was refused; that appellee did not know the negro, but the check was taken for collection, and after it was collected by appellant and the amount sent to appellee, it paid the same to the man who had so presented the check as aforesaid, who falsely represented himself to be W. H. Kellison; that it did not receive notice of the forgery until after the money had been so paid, and did not then know where said negro was, nor have any knowl-

edge of his location until informed by appellant's letter of October 19 that he was in jail in Anderson; that said negro represented himself to be W. H. Kellison, but appellee did not know W. H. Kellison nor the negro who so represented himself to be Kellison, nor did it know the handwriting of W. H. Kellison; that when appellee so indorsed the check as aforesaid and sent it to appellant it accompanied the same with a slip, a copy of which is above set out, and thereby intended to place upon appellant the whole responsibility of determining the genuineness and value of the check; that when appellee received the money collected by appellant on said check it believed appellant had ascertained the check to be genuine, and thereafter paid the money over to the presenter of the check as aforesaid; that when appellee refused in the first instance to cash the check, and offered to take the same for collection, said colored man showed no hesitancy or unwillingness, but readily assented thereto, and later on called and inquired if the bank had received payment on the check; that W. H. Kellison was a depositor in appellant's bank, but appellee had never known nor heard of him before the transaction in controversy; that appellant gave the check only ordinary examination before paying the same, and was at the time acquainted with the usual and customary method of banks in widely separated places in forwarding checks from the holding bank to the drawer bank, and knew that it is the usual and ordinary practice to send the same through a correspondent bank for collection and credit, by mail, each receiving bank in turn crediting the bank sending the check to it and charging the bank to which it is sent

Commercial, etc., Bank Co. v. Citizens Nat. Bank—68 Ind. App. 417.

with the amount thereof, and indorsing the check, all without charge to one another, and that such method is called forwarding "for collection and credit"; that in some instances, where prompt return is desired, the holding bank sends check by mail direct to the drawer bank for honor, and such plan is designated "for collection and return," and in such instances the drawer bank, if it honors the check, remits the amount by draft or otherwise by mail direct to the holder; that the forwarding of checks "for collection and return" as aforesaid is infrequent in proportion to those sent for "collection and credit," and in actual practice the checks so sent are not more than three or four out of 100 and this was the only transaction of the kind between appellant and appellee; that appellant was at the time familiar with the signature and handwriting of W. H. Kellison; that appellee has never received from said colored man or from any one the amount so paid him as aforesaid or any portion thereof.

Appellant asserts that it is entitled to recover in this case under the general proposition of law that money paid under a mistake of fact may be re-

1. covered by the person making such payment.

While there is no dispute as to such general principle or rule of law, and its application to many transactions, textwriters and courts have expressed widely different views as to how far the rule is applicable where drawees of bills and checks, and especially banks of deposit, are involved.

It is universally held that an exception to the general rule aforesaid obtains as to drawees of bills by which they are charged with knowledge of the signatures of the drawers of such instruments, and as a

Commercial, etc., Bank Co. v. Citizens Nat. Bank—68 Ind. App. 417.

general rule must bear the loss, if any, resulting from a failure on their part to detect forgeries until after payment has been made.

The principle underlying such rule or exception is applied to banks of deposit, and they are charged with the responsibility of knowing the signatures of their depositors. Where a check purporting to have been drawn by one of such depositors is presented to the bank by a *bona fide* holder thereof for value, and is paid by the bank, the latter cannot compel such holder to whom payment has been so made to repay the amount to it, if it subsequently discovers the check to have been forged. *First Nat. Bank of Crawfordsville v. First Nat. Bank of Lafayette* (1891), 4 Ind. App. 355, 360, 30 N. E. 808, 51 Am. St. 221; *Snodgrass v. Sweetser* (1896), 15 Ind. App. 682, 688, 44 N. E. 648; 5 R. C. L. §§77, 78, pp. 552-554; 3 R. C. L. §244, p. 615; 2 Daniel, *Negotiable Instruments* (6th ed.) §§1654a, 1655, 1655a, 1656, 1657; 2 Morse, *Banks and Banking* (4th ed.) §463; 8 C. J. §844, pp. 606-609; 7 C. J. §§416, 417, pp. 688, 689; *Price v. Neal* (1762), 3 Burr. 1354; *United States Bank v. Bank of Georgia* (1825), 10 Wheat. 333, 6 L. Ed. 334; *First Nat. Bank v. Bank of Wyndmere* (1906), 15 N. D. 299, 108 N. W. 546, 10 L. R. A. (N. S.) 49, and notes pp. 50-59; *Bank, etc. v. McDowell County Bank* (1909), 66 W. Va. 545, 66 S. E. 761, 36 L. R. A. (N. S.) 605; *State Bank v. Cumberland Savings, etc., Co.* (1915), 168 N. C. 605, 85 S. E. 5, L. R. A. 1915D 1138; *Neal v. Coburn* (1898), 92 Me. 139, 42 Atl. 348, 69 Am. St. 495; *Pennington County Bank v. First State Bank* (1910), 110 Minn. 263, 125 N. W. 119, 26 L. R. A. (N. S.) 849; *People's Bank v. Franklin Bank* (1889), 88 Tenn. 299, 12 S. W. 716, 6 L. R. A. 724, 17 Am. St. 884; *Commercial, etc., Bank v. First Nat. Bank* (1868), 30 Md. 11, 96 Am. Dec. 554.

Commercial, etc., Bank Co. v. Citizens Nat. Bank—68 Ind. App. 417.

The rule which protects a *bona fide* holder in his right to retain money paid by a drawee upon a bill or check to which the drawer's signature is subsequently ascertained to be forged was first announced by Lord Mansfield in *Price v. Neal*, *supra*. The case was followed by Justice Story in *United States Bank v. Bank of Georgia*, *supra*, and has generally been recognized and followed in this country, though with varying modifications and interpretations.

It has frequently been announced that this rule is founded on the supposed negligence of the bank in failing to detect the forgery and refuse payment. But there are several important reasons which have led to the adoption and application of the rule. Banks of deposit have superior advantages and facilities for knowing the signatures of their depositors and detecting forgeries. For this reason it has generally been recognized that the rule is especially applicable where the drawee is a bank of deposit, and the check purports to have been drawn upon it by one of its depositors. The question of public policy is also taken into account, and it is held that, as between a good-faith holder for value of a check purporting to have been drawn upon such bank by one of its depositors, the bank should be made the place of final settlement, where all prior mistakes or forgeries should be detected, settled, or corrected, once for all, and, if not then and there detected, payment by such bank to such holder should be treated as final, without recourse upon any such holder by the bank making payment under such circumstances.

The rule also tends to promote the security of depositors and the stability of banks, and should not be relaxed or ignored for trivial reasons or minor con-

siderations, but should be applied unless the facts and circumstances of the involved transaction bring it clearly within some established rule adopted and enforced to promote the ends of justice. *Bank, etc. v. McDowell County Bank, supra*; 5 R. C. L. 554, 555; *First Nat. Bank, etc. v. Marshalltown State Bank* (1899), 107 Iowa 327, 77 N. W. 1045, 44 L. R. A. 131; *Germania Bank v. Boutell* (1895), 60 Minn. 189, 62 N. W. 327, 27 L. R. A. 635, and notes, 51 Am. St. 519.

The foregoing rule as to drawees and banks of deposit has not been applied with uniformity by the different states. It is universally recognized where all the fault of a failure to detect a forgery may reasonably be laid upon the bank which has failed to detect a forgery of the name of one of its depositors who is himself without fault, where the loss would fall upon him if not borne by such bank, and likewise as against any *bona fide* holder for value of such check who is free from any fault or negligence contributing to the loss resulting from the forgery.

But where the holder of the check has been remiss in the discharge of some duty incumbent upon him, or has misled the payee bank by something done or omitted which fair dealing and commercial usage require of him in such transactions, the rule has been relaxed, and a recovery permitted under the general rule which authorizes a recovery of money paid out under a mistake of fact.

What is generally known as the negligence rule has been adopted in many jurisdictions, under which a recovery is authorized against the party whose fault or negligence was the proximate cause of the loss sustained by a failure to detect a forgery before payment of such check or other forged instrument.

Commercial, etc., Bank Co. v. Citizens Nat. Bank—68 Ind. App. 417.

In some jurisdictions the rule of responsibility of drawees and banks of deposit is strictly enforced in all instances, except those in which the holder of the check has knowledge of, or participates in, the fraud upon such drawee. 2 Daniel, Negotiable Instruments (6th ed.) §1657.

Where the negligence rule has been adopted, and the fault or negligence, which was the proximate cause of the loss resulting from a failure to detect a forgery before payment of the instrument, can be traced wholly to the bank of deposit or other drawee, or to the holder of the check, the rule is of easy application and the loss is placed upon the party so at fault. But where the facts show some negligence or failure of duty on the part of each, there is less uniformity in the application of the rule. Some courts place the loss upon the party first in fault in the transaction.

The weight of authority is to the effect that responsibility of the bank or drawee who pays such forged check, is absolute only in favor of one who has not by his own fault or negligence contributed to the success of the fraud, or by his conduct misled the bank, or in some way induced a sense of safety which reasonably may have caused such bank to lessen its vigilance by reliance upon such conduct. This court has heretofore recognized this principle. *First Nat. Bank of Crawfordsville v. First Nat. Bank of Lafayette*, *supra*; *Ind. Nat. Bank, etc. v. First Nat. Bank, etc.* (1893), 9 Ind. App. 185, 36 N. E. 382; 7 C. J. §417, pp. 688-691; *Ford & Co. v. People's Bank, etc.* (1906), 74 S. C. 180, 54 S. E. 204, 10 L. R. A. (N. S.), notes p. 63, 114 Am. St. 987; *Farmers Nat. Bank, etc. v. Farmers & Traders Bank, etc.* (1914), 159 Ky. 141, 166 S. W.

Commercial, etc., Bank Co. v. Citizens Nat. Bank—68 Ind. App. 417.

986, L. R. A. 1915A 77-82, 84; *Pennington County Bank v. First State Bank*, *supra*; *First Nat. Bank of Danvers v. First Nat. Bank of Salem* (1890), 151 Mass. 280, 24 N. E. 44, 21 Am. St. 450. In *Farmers Nat. Bank, etc. v. Farmers & Traders Bank, etc.*, *supra*, the court, in referring to the above rule, said: "Where the parties are equally innocent the drawee is the loser."

The decisions are not in harmony as to the effect of payment by the drawee bank to a holder who has indorsed the check so paid. Where the indorsement is "for collection" or for "account of" it is generally held that it is notice to the drawee bank that the presenter of the bill or check is not the owner, and that such indorsement will not justify the drawee bank in relaxing its vigilance, but it must at its peril determine the genuineness of the signature purporting to be signed by one of its depositors. *First Nat. Bank, etc. v. First Nat. Bank, etc.* (1881), 76 Ind. 561, 40 Am. Rep. 261; *Commercial Nat. Bank v. Armstrong* (1893), 148 U. S. 50, 13 Sup. Ct. 533, 37 L. Ed. 363; *First Nat. Bank of Belmont v. First Nat. Bank of Barnesville* (1898), 58 Ohio St. 207, 50 N. E. 723, 41 L. R. A. 584, 65 Am. St. 748; *Farmers, etc., Bank v. Bank, etc.* (1905), 115 Tenn. 64, 88 S. W. 939, 112 Am. St. 817; *Dedham Nat. Bank v. Everett Nat. Bank* (1901), 177 Mass. 392, 59 N. E. 62, 83 Am. St. 286; *First Nat. Bank, etc. v. City Nat. Bank, etc.* (1902), 182 Mass. 130, 65 N. E. 24, 94 Am. St. 637; *Crocker, etc., Bank v. Nevada Bank* (1903), 139 Cal. 564, 73 Pac. 456, 63 L. R. A. 245, 96 Am. St. 169; 7 C. J. §421, pp. 692-695.

This court has heretofore applied the negligence rule to a transaction involving an indorsement of an

Commercial, etc., Bank Co. v. Citizens Nat. Bank—68 Ind. App. 417.

instrument "for collection." In the case of *First Nat. Bank of Crawfordsville v. First Nat. Bank of Lafayette*, *supra*, the view is expressed that such indorsement may tend to throw the drawee bank off its guard, and cause it to relax its vigilance, and thereby induce payment of a check or other forged instrument by the bank when, in the absence of such indorsement, the forgery might have been detected by the bank which made the payment. In that case the court was considering the sufficiency of an answer by the bank which had indorsed an instrument for collection and received payment thereof from the payee bank, through another bank, and afterwards ascertained the instrument to be a forgery, and sought to recover the money so paid by it from the bank which had so indorsed the instrument. In addition to the foregoing statements, the court indicates that the answer did not show that to compel payment would place the defendant in any worse situation than it would be in if payment were refused or a recovery denied. The instrument purported to be the obligation of a township, executed by its trustee, and the court held that it was not negotiable by the law merchant, and that its presentation and payment were not in all respects governed by the rules applicable to instruments of the latter class; also, that the averments of the answer on the question of notice of the discovery of the forgery were insufficient. The case lends credence to the proposition that an indorsement by a bank of an instrument "for collection" does not necessarily relieve such bank from liability in all cases where it is subsequently ascertained that the instrument had been forged, and the question of liability arises between the bank making such indorsement and the bank which accepts and

Commercial, etc., Bank Co. v. Citizens Nat. Bank—68 Ind. App. 417.

pays such check or other obligation. The case gives as the reason for the rule of responsibility of drawees and banks of deposit their supposed negligence in failing to detect forgeries.

This view, though frequently expressed by text-writers and in opinions of courts, is too narrow, and the tendency now is to adopt the broader and more substantial reasons above stated. Checks are in constant use in business transactions through banks, and the character and use of such instruments afford much stronger reason for the rule which makes drawees and banks of deposit responsible for knowing the signatures of drawers or depositors than obtains in the case of instruments of the class under discussion in *First Nat. Bank of Crawfordsville v. First Nat. Bank of Lafayette*, *supra*. That case does not, however, depart from the general rule which holds banks responsible for knowledge of the signatures of their depositors, but recognizes exceptions thereto where the other party is wholly, or in part, responsible for the failure to detect the forgery before payment of the forged instrument. If the decision in fourth appellate, *supra*, is construed as an authority holding that a bank indorsing an instrument for collection and sending it to the bank upon which it is drawn or at which it is payable thereby assumes all responsibility for detecting a forgery, where such instrument purports to be the check of a depositor of the bank to which it is sent, we are of the opinion that both the weight of authority and the better reason are against it, and that it should not be followed to that extent.

The weight of modern authority, where the negligence rule is invoked, is that responsibility falls

Commercial, etc., Bank Co. v. Citizens Nat. Bank—68 Ind. App. 417.

upon the party whose negligence or conduct is wholly responsible for the loss, and that as between a drawee bank and a *bona fide* holder of a check indorsed for collection and sent to such bank for collection and credit, or for return, if a loss results which must be borne by one or the other of such banks because the instrument is afterwards found to be a forgery, both having been at fault, the holder for so indorsing the check without further information to put the payee bank on guard, and the payee bank for failing to discharge the duty of detecting a forgery of the name of one of its depositors, the law will leave the loss resulting therefrom where the parties have placed it by their dealings, and will not come to the assistance of either as against the other because of his fault or negligence contributing to such loss.

In the case of *Bank, etc. v. McDowell County Bank, supra*, the court said: "By its conduct, the McDowell County Bank induced the Bank of Williamson to do what it refrained from doing itself, pay money to an unidentified stranger. In fact, it took the check for collection, instead of purchasing it, because the party claiming to be payee was unknown to it, and refused to pay him the money until it had collected the same. If it had told the Bank of Williamson the status of the matter, that bank would have been more cautious. It not only did not do this, but, on the contrary, endorsed the check as if it had been bought outright, and expressly guaranteed the genuineness of the forged endorsement, 'George Horner.' This was a representation to the Williamson bank that there was a George Horner, and that he was the payee, having right to the money, and had transferred that right to the bank, and, possibly, that he was good for \$800.00 in case

Commercial, etc., Bank Co. v. Citizens Nat. Bank—68 Ind. App. 417.

the check should prove to be worthless. I am unable to perceive the reason or ground upon which it can be said that such a representation may not have induced action on the faith of it, and, was not dangerous to the party to whom it was made.

“But there is another element in the case. The Bank of Williamson was also negligent. It had no signature of its depositor in its possession or within its reach, in any form whatever, to enable it to make any investigation of the genuineness of the signature to the check. As we have shown, no recovery can be had, if both parties are without fault. Negligence or omission of duty, on the part of the first taker, causing, or likely to cause, injury to the drawee, is the circumstance that deprives the former of the benefit of the exemption of dealers in commercial paper from the operation of the general rule, allowing recovery of money paid under a mistake of fact. * * * The exemption rests upon the assumption of innocence in both parties. If both are at fault, as in this case, it seems to follow that neither, while claiming, or accorded, the benefit of the exception to the general rule, should be permitted to deny its protection to the other. It is an arbitrary rule of commercial law, and the reasoning which justifies it, when both parties are innocent, justifies it also, when both parties are at fault. It was the duty of the drawee to determine, at its peril, the genuineness of the signature of its depositor, and its sole right to demand reimbursement from the defendant rests upon technical fault in the latter. * * * Therefore, having been negligent itself, the plaintiff is not entitled to recover on the technical ground of negligence in the defendant.”

In the foregoing case the court quotes extensively

Commercial, etc., Bank Co. v. Citizens Nat. Bank—68 Ind. App. 417.

from the case of *Vagliano Bros. v. Bank of England* (1889), L. R. 23 Q. B. Div. 243, 248, 251, decided by Lord Esher, where both litigants were shown to have been guilty of negligence contributing to the loss resulting from a forged instrument, and the court said: "The officials of the bank neglected this precaution and paid the bills over the counter to a man whom they did not know. This, in our opinion, was negligence on the part of the bank, which materially contributed to the frauds in question being successfully carried out by Glyka. This, we think, would prevent the bank from effectually relying on the defense of negligence of the plaintiff."

In the case of *Commercial, etc., Bank v. First Nat. Bank, supra*, it is said that: "The loss as between parties thus equally innocent and equally deceived, but where one is bound to know and act upon his knowledge, and the other has no means of knowledge, should be thrown upon the latter in exoneration of the former. * * * The safest rule for the commercial public, as well as that most consistent with justice, is to allow the loss to remain where by the course of business it has been placed."

Checks, as ordinarily drawn and used in business, are classed as inland bills of exchange, and, with certain exceptions and limitations, are governed by the same rules which prevail in relation to such bills of exchange.

Our Negotiable Instruments Act defines a check as a bill of exchange payable on demand and states that, "Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check." §9089c7 Burns 1914, Acts 1913 p. 120, §185; 5 R. C. L. §§2, 3, pp.

Commercial, etc., Bank Co. v. Citizens Nat. Bank—68 Ind. App. 417.

479-481; 2 Daniel, Negotiable Instruments (6th ed.) §§1651, 1652.

Daniel in his work on Negotiable Instruments, in speaking of the Negotiable Instrument Statute says that: "In the case of checks, it seems generally to be held that the states which have enacted the statute have adopted the rule announced in *Price v. Neal* * * * and under that rule, where a drawee bank pays a check to a *bona fide* holder, such drawee cannot recover the money back on discovering such check to be forgery." 2 Daniel, Negotiable Instruments (6th ed.) §1657; *First Nat. Bank v. Bank, etc.* (1911), 59 Ore. 388, 117 Pac. 293; *Title, etc., Trust Co. v. Haven* (1909), 196 N. Y. 487, 89 N. E. 1082, 1085, 25 L. R. A. (N. S.) 1308, 17 Ann. Cas. 1131. There are some exceptions to the general rule that an indorser of a negotiable instrument warrants its genuineness. An unrestricted indorsement indicating an absolute transfer and sale of the instrument warrants its genuineness. But it is generally held that the indorsement of a check or like instrument by one other than the payee of such instrument does not extend to the signature of the maker or drawer thereof, and as applied to a depositor of a bank, the latter is bound to know the signature of its customer, notwithstanding such indorsement. 1 Daniel, Negotiable Instruments (6th ed.) §§670, 671, 672. In *Bank, etc. v. McDowell County Bank, supra*, it is said: "In conformity with these principles, it is uniformly held that a bank endorsing a check, not drawn upon it, warrants the genuineness of all the preceding signatures endorsed on it, including that of the payee, but not that of the drawer. *First Nat'l Bank v. Northwestern Nat'l Bank*, 152 Ill. 296, (43 Am. St. Rep. 247); *Williams v. Tishomingo*

Commercial, etc., Bank Co. v. Citizens Nat. Bank—68 Ind. App. 417.

Savings Inst., 57 Miss. 633; Story on Bills of Exchange, section 225; 2 Parsons on Bills & Notes 588.

“Such is the great weight of authority on the question presented. Only four cases holding the contrary have been found. * * * In so far as they allow the benefit of the exception under circumstances showing negligence or misconduct on the part of a bank purchasing, or taking for collection, and putting into circulation, as if it had been purchased, a check drawn upon another bank, they are wholly irreconcilable with the great weight of judicial opinion and decision, as well as variant from the spirit of the exception declared in *Price v. Neal* and the great number of subsequent decisions in which it has been observed. In the last two, circumstances were disclosed which tended to prove negligence on the part of the drawers, off-setting that on the part of purchasing banks. When both have been negligent, not merely unfortunate, no recovery can be had.”

In *First Nat. Bank of Belmont v. First Nat. Bank of Barnesville*, *supra*, it is said: “It is urged that the Belmont bank having indorsed the check, thereby guaranteed that the signatures of the drawer and indorsers were genuine, and some cases are cited to that effect. *Peoples Bank v. Franklin Bank*, 88 Tenn., 299; 17 Am. St. Rep., 884; *First National Bank of Danvers v. First National Bank of Salem*, 151 Mass., 280; 21 Am. St. Rep. 450. Other cases hold, that an indorser does not guarantee that the name of the drawer is genuine, but that the drawee must determine that for himself, and at his own peril. *Germania Bank of Minneapolis v. Boutell*, 60 Minn., 189; 27 L. R. A., 635, and cases there cited. In the cases in which it has been held that the indorsement is a guar-

anty, to the effect that the name of the drawer is genuine, the indorsements were unrestricted, and therefore indicated an absolute transfer and sale of the paper. But when the indorsement is for collection only, as in this case, it indicates on its face, that the indorser remains the owner of the paper, and that his successive indorseees are only his agents for the sole purpose of collecting the paper, and remitting the proceeds to him. Such a restricted indorsement does not authorize a subsequent indorsee to negotiate the paper. His only power is to collect it, and the drawee bank is bound by the notice in the indorsement. Such an indorsement is not a guaranty that the name of the drawer is genuine, but only that the names of the indorsers then on the paper are genuine."

In *Germania Bank, etc. v. Boutell, supra*, the Supreme Court of Minnesota said: "It owed the plaintiff no duty to investigate as to the genuineness of the signature of its own customer, and the plaintiff had no right to assume that it had made such investigation. It seems to us that the same is true as to Boutell Bros. The distinction must be kept clearly in mind between their duty and responsibility to the defendant bank or any other *bona fide* indorsee of the check, and their duty and responsibility to the plaintiff bank, with reference to the genuineness of the signature of its own customer. By indorsing the check, Boutell Bros. undoubtedly guaranteed to the defendant bank the genuineness both of Osborne & Clark's signature and of Seymour's indorsement as the payee. * * * But upon the question of the genuineness of the signature of Osborne & Clark, the drawee's own customers, the case stands upon an entirely different footing. Not being the original payees of the check, the indorse-

Commercial, etc., Bank Co. v. Citizens Nat. Bank—68 Ind. App. 417.

ment of Boutell Bros. constituted no guaranty or representation to the drawee that the signature of the drawer was genuine; and the plaintiff had no right to rely on it as such, or to assume that Boutell Bros. had investigated as to its genuineness. That was a matter which it devolved on the plaintiff to ascertain for itself when the check was presented.”

In 2 Daniel, Negotiable Instruments (6th ed.) §1365, the author states that: “The distinction between the acknowledgement of the drawer’s and of the indorser’s signature is carried so far, that, if the bill be made payable to the drawer’s own order, and indorsed by him, the acceptance is regarded as admitting the drawing only, and not the indorsement, although the name is the same, and they profess to be, and apparently are, written by the same party.”

In 5 R. C. L. §76, pp. 551, 552, it is said: “It seems to be a settled rule of law that one who unrestrictedly indorses a check, for the purpose of transferring title thereto, impliedly warrants, by such act, that the instrument is genuine. * * * An indorsement of a check for collection does not guarantee the signatures of the prior endorsers. The indorsement of an indorser, using that word in its technical sense, imports a guaranty of previous signatures, because it is a transfer and sale; but an indorsement which is not made for the purpose of transfer is not an indorsement within the law merchant, and does not carry with it a guaranty of previous indorsements.”

In the case at bar the Indiana bank took the proper precautionary measures at first by refusing to cash the check of an unidentified person. But by its

2. indorsement of the check it became in some measure responsible for the failure to detect

the forgery before payment of the check by the Ohio bank.

True, the slip accompanying the check, should be taken into account on the question of negligence, and appellant was not at liberty to wholly ignore it. It tended to indicate to appellant that the Indiana bank was not assuming responsibility in determining the genuineness of the signature of the drawer. But this fact could not entirely annul or change the probable effect of the indorsement guaranteeing all prior indorsements. When once the door is opened to a consideration of any conduct or negligence of the parties, other than fraud, in such transactions, fairness and justice require consideration of all that was done or omitted which could in any way affect the question to be determined. The indorsement of the check by the Indiana bank and the slip accompanying the same, considered together, should have called the Ohio bank's attention to the fact that the indorsement did not indicate an absolute sale and transfer of the check. This, we think, must be true independent of the rule above announced, that an indorsement of a check by a party other than the payee does not apply to the signature of the drawer of the check, by which rule alone appellant would be held negligent in failing to detect a forgery of the signature of one of its own customers. It would be an unsafe rule to hold that the things done or omitted by the Indiana bank relieved the Ohio bank from all responsibility in determining the genuineness of the signature purporting to be that of one of its depositors. By failing to detect the forgery it became absolutely responsible to its depositor, and its fault in that respect was in part, at least, responsible

Lake Land Co. v. State, ex rel.—68 Ind. App. 439.

for the loss that, on the facts of this case, must be borne by one or the other of such banks.

The facts make a case where the fault of both contributed to the loss, and under the law as above announced the decision of the trial court is sustained by sufficient evidence, and no error was committed in denying appellant's right to recover or in overruling the motion for a new trial. Judgment affirmed.

Caldwell, C. J., Ibach, Dausman, Batman and Hotel, JJ., concur.

NOTE.—Reported in 120 N. E. 670.

LAKE LAND COMPANY ET AL. v. STATE OF INDIANA,
EX REL. ATTORNEY GENERAL.

[No. 9,990. Filed November 19, 1918.]

1. ATTORNEY-GENERAL.—*Right to Sue in Name of State.—Statutes.*—Under §9269 Burns 1914, Acts 1889 p. 124, and §9270 Burns 1914, Acts 1899 p. 219, providing that the Attorney-General shall prosecute all suits brought by the state, the Attorney-General has such an interest in the subject-matter of an action by the state to enjoin the removal of sand and gravel out of Lake Michigan within the state as to authorize the bringing of such action on his relation. p. 442.
2. NAVIGABLE WATERS.—*Lands Under Water.—Right to Use.—Rights of Citizens of Other States.*—The right of a state in and under the waters of Lake Michigan within the state is a holding in trust for the people of the state as a whole, and they may use such lands so long as they do not interfere with their use by other citizens, but that privilege does not extend to citizens of another state or to foreign corporations. p. 443.
3. NAVIGABLE WATERS.—*Lands Under Water.—Grants.—Powers of State.*—The state in its sovereign capacity is without power to convey or curtail the rights of its people in lands under Lake Michigan within the boundaries of the state. p. 446.
4. NAVIGABLE WATERS.—*Removal of Land Under Water.—Action by*

Lake Land Co. v. State, ex rel.—68 Ind. App. 439.

State to Enjoin.—Complaint.—Sufficiency.—In an action by the state on the relation of its Attorney-General to enjoin the removal by a foreign corporation of sand from the bed of Lake Michigan within the boundaries of the state, the complaint, although not alleging that any damage would result to plaintiff by the removal of the sand, but averring that the deposits of sand and gravel being removed were valuable in the market and stating the fair market value thereof, *held* sufficient to state a cause of action. pp. 446, 447.

5. *INJUNCTION.—Trespass.—Right to Enjoin.—Irreparable Injury.*—An action for an injunction cannot be successfully maintained to restrain or prevent the commission of a mere trespass unless it is made to appear that the injury apprehended therefrom will be great or irreparable. p. 446.
6. *NAVIGABLE WATERS.—Lands Under Water.—Removal.—Right to Enjoin.—“Purpresture.”*—In an action by the state to enjoin the removal of sand and gravel from the bed of Lake Michigan within its borders, the complaint is not aided by the doctrine of purpresture, since a purpresture signifies an encroachment to the exclusion of others, or a permanent obstruction, whereas the trespass alleged was a temporary use by anchoring vessels for dredging. p. 447.

From Lake Superior Court; *Virgil S. Reiter*, Judge.

Action by the State of Indiana, on the relation of the Attorney-General, against the Lake Sand Company and others. From a judgment for relator, the defendants appeal. *Affirmed*.

Gavit, Hall & Smith and *John A. Gavit*, for appellants.

Evan B. Stotsenburg, Attorney-General, *Peter Crumpacker*, *Fred C. Crumpacker*, *Charles Crumpacker* and *Harry B. Tuthill*, for appellee.

IBACH, J.—The State of Indiana by and on the relation of its Attorney-General brought this action to enjoin appellants from taking sand and gravel out of the bed of Lake Michigan within the boundaries of this state.

The questions presented by the record arise out of the overruling of appellant's separate demurrer for want of facts to the substituted complaint, hereinafter referred to as the complaint.

The complaint is long. The introductory statement reads: "The plaintiff, State of Indiana, by and on the relation of its Attorney-General, Evan Stotsenberg, for substituted complaint complains," etc. Other material facts bearing on the questions presented are in brief as follows: Under the waters of Lake Michigan within the boundaries of this state there are large deposits of sand and gravel, which are valuable in the market. The appellants are foreign corporations domiciled in the State of Illinois. For several years they have been committing daily trespasses on plaintiff's lands, under the waters of Lake Michigan, by going thereon and severing therefrom the sand and gravel deposits in the bed of the lake. Such sand and gravel as it lay on the bed of the lake was at the time of its removal of the fair market value of three cents a cubic yard. The sand and gravel was removed by the appellants by means of dredges, loaded in barges and conveyed to the city of Chicago, where it was sold on the market. It is further alleged that appellants will continue to commit daily trespasses upon such lands and continue to take sand and gravel therefrom unless enjoined from so doing; that it is impossible to estimate the damage that will result from such trespasses, and they would result in numerous law suits; that the remedy at law would be inadequate.

Among the objections set out in the memorandum accompanying the demurrer are the following: "3. The said complaint shows that the relator has no in-

terest in the subject-matter of this action. 4. Said complaint shows that if any right of action exists, it exists in the State of Indiana as plaintiff and not in the Attorney-General of said state.”

We are inclined to treat these objections as technical rather than substantial, in view of the nature of the action and the theory upon which the com-

1. plaint is drawn. The word “plaintiff” wherever found in the complaint is in the singular number, and thus signifies that there is but one plaintiff, and the introductory statement heretofore set out shows that the plaintiff making complaint is the “State of Indiana.” But if we are wrong in this assumption, the statute (§§9269, 9270 Burns 1914; Acts 1889 p. 124, Acts 1899 p. 219) would seem to create such interest in the Attorney-General as would authorize the action to be brought on his relation. Section 9269, *supra*, makes it mandatory upon the Attorney-General to prosecute and defend all suits that may be instituted by or against the State of Indiana, the prosecution or defense of which is not otherwise provided by law, while §9270, *supra*, provides: “That the attorney general shall have charge of and prosecute all civil actions which shall hereafter be brought, either in the name of the State of Indiana, or in the name of the State of Indiana on relation of the attorney general, or on the relation of any state board created by general law.” See *State, ex rel. v. Insurance Co.* (1888), 115 Ind. 257, 17 N. E. 574; *McCaslin v. State, ex rel.* (1873), 44 Ind. 151; *State v. Ohio Oil Co.* (1898), 150 Ind. 21, 49 N. E. 809, 47 L. R. A. 627.

In the case first cited the court uses this language: “We do not doubt the power and authority of the attorney general to commence the action now before

us (action to recover fees from foreign insurance company) and prosecute it to a final determination in the name of the State of Indiana upon his own relation, or *ex rel.* the auditor of state, or without any relator." And in *State v. Johnson, Admr.* (1875), 52 Ind. 197, it was held that, where a cause of action exists in favor of the state, and the action is brought in the name of the state for a certain specified use, the words designating such use will be considered as surplusage, and the action will be regarded as an action properly brought by the state. The complaint is sufficient as against such objections.

It is further insisted that, as the complaint does not show that the appellants were removing the sand and gravel from the bed of the lake to the exclu-

2. sion of others, they are doing no more than they are entitled to do, and the complaint shows no grounds for equitable interference. It thus becomes necessary to determine the nature of the title of the state to the bed of Lake Michigan lying within its border. Appellants in effect concede that such land is held by the state in trust for the people as a whole, and the property so held in trust is common property of all, from which all may partake so long as in the taking none attempt to deprive others of a like privilege, but contend that it is held for the benefit of *all*, including appellants, and that until the state regulates the method of taking common property there can be no restraint or regulation, except only the power in the trustee to prevent the appropriation by one to the exclusion of others.

In *Sloan v. Biemiller* (1878), 34 Ohio St. 492, with reference to the nature of the title of the state to the subaqueous land of Lake Erie, it was said: "Al-

though the dominion over and the right of property in the waters of the sea and its inland waters were, at common law, in the crown, yet they were of common public right for every subject to navigate upon and to fish in, without interruption. * * * They were regarded as the inherent privileges of the subject, and 'classed among those public rights denominated *jura publica*, or *jura communia*, and thus contradistinguished from *jura coronae*, or private rights of the crown.' * * * The sovereign was the proprietor of these waters, as the representative or trustee of the public. In this country the title is vested in the states upon a like trust, subject to the power vested in Congress to regulate commerce." See *Martin v. Waddell* (1842), 16 Pet. 367, 412, 10 L. Ed. 997, 1013; *McCready v. Virginia* (1876), 94 U. S. 391, 24 L. Ed. 248; *State v. Cleveland, etc., R. Co.* (1916), 94 Ohio St. 61, 113 N. E. 677, L. R. A. 1917A 1007; *People v. Kirk* (1896), 162 Ill. 138, 45 N. E. 830, 53 Am. St. 277; *Rossmiller v. State* (1902), 114 Wis. 169, 89 N. W. 839, 58 L. R. A. 93, 91 Am. St. 910; *State v. Rodman* (1894), 58 Minn. 393, 59 N. W. 1098. We must conclude from our examination of the adjudged cases that the term "all" and words of similar import as used in the American cases have reference to the people of the individual state as distinct from the nation.

In *People v. Kirk*, *supra*, cited by appellants, the court uses the following language: "The legislature represents not only the state, which holds the title which at common law was vested in the crown, but the legislature also represents the public, for whose benefit the title is held, and in that capacity it possesses the sovereign power of parliament over the

waters of the lake and the submerged lands covered by the waters.”

In *Rossmiller v. State*, *supra*, also cited by appellants, involving the validity of a statute prohibiting the cutting of ice in the navigable waters of Wisconsin for shipment beyond its borders, the court said: “The title to the beds of such (navigable) lakes is in the state, but not for its own use as an entity. The mere naked legal title rests in the state, but the whole beneficial use thereof, including the use of the ice formed thereon, is vested in *the people of the state as a class*.”

In *Ex parte Powell* (1915), 70 Fla. 363, 372, 70 South. 393, the court uses this language: “Among the rights thus acquired by the State of Florida is the right to own and hold the lands under navigable waters within the state including the shores or space between ordinary high and low water marks, for the benefit of *the people of the state*, * * *. When the Constitution of the United States became operative, the several states continued to hold the title to the beds of waters within respective borders that were navigable in fact without reference to the tides of the sea, not for purposes of disposition to individual ownerships, but such title was held in trust for all *the people of the states respectively*,” etc.

In *Southern Sand, etc., Co. v. State, ex rel.* (1915), 121 Ark. 1, 180 S. W. 219, the court said: “The state holds the beds of the navigable streams for the common use of *her citizens*.” (Our italics throughout.)

The appellants are foreign corporations, and are not citizens within the meaning of the Constitution when it declares that the citizens of each state shall be entitled to the privileges and immunities of citi-

zens of the several states. *Pembina Mining Co. v. Pennsylvania* (1888), 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; Art. 4, §19, U. S. Constitution.

The state in its sovereign capacity is without power to convey or curtail the right of its people in the bed of Lake Michigan (*State v. Cleve-*

3. *land, etc., R. Co., supra*), and, as the appellants are foreign corporations, it follows that their entering upon the lands described and the removal of the sand and gravel therefrom is without right.

It is further insisted that the complaint does not show that the plaintiff has sustained any damages by reason of the acts of defendants alleged in

4. the complaint, or that it will sustain any damages by reason of the continuation hereafter of such acts, and that a mere naked trespass which can do no damage cannot be enjoined. This objection to our minds presents the most serious question. It is not claimed or alleged in the complaint that any damage will result to the plaintiff by the removal of the sand and gravel by the appellants, but it is argued by appellee that the state may sell this material to produce a fund that can be used for beneficial purposes to her citizens, and hence she has the right, and her administrative department has the right, to prevent by injunction the taking thereof without alleging or proving damages; that damages are presumed.

The rule seems to be well settled in this state that an action for an injunction cannot be successfully maintained to restrain or prevent the commis-

5. sion of a mere trespass unless it is made to appear that the injury apprehended therefrom

Lake Land Co. v. State, ex rel.—68 Ind. App. 439.

will be great or irreparable. *Wabash R. Co.*

6. v. *Engleman* (1902), 160 Ind. 329, 331, 332, 66

N. E. 892, and cases cited. Neither is the complaint aided by the doctrine of purpresture, as a purpresture means more than a mere temporary anchorage of vessels while loading; it signifies an inclosure or encroachment to the exclusion of others. A purpresture is any permanent or habitual obstruction of a public street, although room enough be left to pass. *Hoey v. Gilroy* (1891), (N. Y. Com. Pl.) 14 N. Y. Supp. 159, 161. See, also, *State v. Kean* (1896), 69 N. H. 122, 45 Atl. 256, 48 L. R. A. 102; *Mayor v. Jaques* (1860), 30 Ga. 506, 512; *People v. Park, etc., R. Co.* (1888), 76 Cal. 156, 18 Pac. 141.

The complaint does allege, however, that the deposits of sand and gravel that are being removed by appellants are valuable in the market, and that

4. as they lay on the bed of the lake at the time of their removal such sand and gravel was of the fair market value of three cents a cubic yard. These facts for the purposes of the demurrer must be taken as true, and, when considered as a whole, we are of the opinion that the complaint states a cause of action.

Judgment affirmed.

NOTE.—Reported in 120 N. E. 714. Ownership of bed of lakes or ponds, 18 L. R. A. 695, L. R. A. 1916C 150. See under (2, 3) 29 Cyc 356, 357.

HEBER ET AL. v. DRAKE ET AL.

[No. 10,197. Filed April 23, 1918. Rehearing denied June 20, 1918. Transfer denied November 19, 1918.]

1. INFANTS.—*Juvenile Delinquents.*—*Appeal.*—*Assignments of Error.*—*Sufficiency.*—*Statute.*—Under §1635 Burns 1914, Acts 1907 p. 221, relating to appeals from juvenile courts, the only assignment of error allowed on appeal is "that the decision of the juvenile court is contrary to law," and such assignment is sufficient to present both the sufficiency of the facts found and the sufficiency of the evidence to support the finding. p. 450.
2. INFANTS.—*Juvenile Courts.*—*Jurisdiction of Person.*—Where, in a proceedings under §1644 Burns 1914, Acts 1907 p. 59, the parents of a child alleged to be neglected and dependent were served with notice of the proceeding, were present in court, and were given every opportunity to be heard, and made no objection to the sufficiency of the evidence to support the decree removing the child from their custody, they cannot complain that the court assumed jurisdiction over the parties. pp. 452, 453.
3. INFANTS.—*Juvenile Delinquents.*—*Juvenile Courts.*—*Change of Judge.*—*Statute.*—A proceeding under §1644 Burns 1914, Acts 1907 p. 59, to remove a child from the custody of the parents is a special statutory one, and a change of venue, as is provided for in ordinary cases, is not contemplated therein. p. 452.
4. INFANTS.—*Juvenile Delinquents.*—*Right to Custody.*—*Findings.*—*Sufficiency.*—In a proceedings under §1644 Burns 1914, Acts 1907 p. 59, findings of the juvenile court that the infant made her home with her parents, that the parents refused to allow her to attend school, that she was cursed, abused and ill treated by both parents, was not provided with proper or suitable clothes and was compelled to do farm labor and was threatened and struck by the father, were sufficient to support a judgment awarding her custody to the board of children's guardians. p. 453.

From Parke Juvenile Court; *Henry Daniels*, Judge.

Proceedings by Andrew Drake and others against Andrew Heber and his wife to have their infant daughter declared a public charge. From a judgment for plaintiffs, the defendants appeal. *Affirmed.*

White & Henderson, for appellant.

Earl M. Dowd, J. M. Johns, S. F. Max Puett and H. H. Banta, for appellees.

IBACH, C. J.—Pursuant to §1644 Burns 1914, Acts 1907 p. 59, a case was brought by Andrew Drake in the juvenile court of Parke county on November 7, 1917, wherein it was charged that Barbara Heber, sixteen years of age, and a daughter of appellants, was a neglected and dependent child and should be made a public charge. A notice was issued by the clerk of such court to appellants to bring such child before the court and to do what should be ordered concerning her. On November 20, 1917, evidence was heard, after which there was a finding and judgment that it was for the best interest of such child to be made a ward of the state, and her custody was awarded to the board of children's guardians of said county.

Following the statutes governing appeals in such cases the judge of such court has certified to this court the following facts: Finding 1. The infant, Barbara Heber, who was sixteen years old on June 10, 1917, is the daughter of Andrew and Emma Heber, and on November 7, 1917, had her home with her parents. Nos. 2 and 3. The home of said Barbara Heber on November 7, 1917, was in Parke county, Indiana, and she was in the junior grade of high school. No. 4. The parents refused to allow her, the said Barbara, to attend school anywhere. No. 5. She was cursed and abused and ill treated by both parents. No. 6. She had not been provided with proper or suitable clothes by her parents, and was compelled by her parents to do work on the farm and other work about the house which was neither proper nor right that she should be required to perform. No. 7. The

father Andrew Heber had at times made threats to the girl that he would kill her and at one time struck her with his fist and knocked her down and bruised her face and body. No. 8. At all times the girl was ill-treated and cursed and abused by both father and mother.

No question is presented with respect to the findings of the court; neither is the evidence before us. We also find in appellants' brief the following: "In no place in our brief have we complained of the sufficiency of the evidence and it was a matter of our own discretion whether or not we should do so."

Appellants' assignment of errors contains many alleged independent errors which could only be presented by incorporating them in the motion

1. for a new trial and then by assigning the action of the court on such motion as error.

But with this course of practice we are not concerned in this appeal for the reason that there is only one assignment of error contemplated by the statute, which presents both the sufficiency of the facts found and the sufficiency of the evidence to support the finding, and that is "that the decision of the (juvenile) court is contrary to law." §1635 Burns 1914, Acts 1907 p. 221; *Parker v. State* (1917), 63 Ind. App. 671, 113 N. E. 763.

Appellants have in effect admitted that the evidence was sufficient to warrant the facts found, but contend that the court should have sustained the mother's affidavit for a change of venue from the judge, and that there was error in assuming jurisdiction over the subject-matter and over the person of the father, Andrew Heber.

Section 1646 (Acts 1907 p. 59) of the same act

provides: "This act shall be liberally construed to the end that proper guardianship may be provided for such child, that the child may be educated and cared for, as far as practicable, in such manner as best subserves its moral, intellectual and physical welfare, and as far as practicable in proper cases that the parent or person having its care, custody or control may be compelled to perform their moral and legal duty in the interest of the child."

The purpose of the act with which we are now dealing could not have been more clearly defined, and we may add that the courts generally in construing similar acts have placed a construction thereon similar to that which our legislature has by definite enactment provided. They have said that the object of the act is not punishment, but reformation, discipline, and education, and, to provide for the proper custody of children within certain age limits who on account of neglect of their parents or for other causes were in need of proper guardianship. While the courts have recognized this to be the primary purpose of the law, they have also consistently recognized the fundamental proposition that every parent is entitled to have the care and custody of his own child, and this right can only be taken from him when it is made to appear that some law of the state enacted for the child's welfare and the welfare of society has been disobeyed by him; that these questions are to be determined only after such parent has been given the opportunity of answering any charges which may be filed against him respecting such matters.

Our Supreme Court in an early case, quoting from a Massachusetts case, has expressed the same prop-

osition in this language: "Whenever the legislature has provided that, on account of crime or misfortune, the public safety or convenience demands a suspension of these essential rights of the individual, and has provided a judicial process, by which the facts shall be ascertained; it is to be understood as required that the tribunal, to which is committed the duty of inquiring and determining, shall give opportunity to the subject to be heard of his innocence or his capacity." *Lee v. Beck* (1868), 30 Ind. 148, 152. Recognizing these principles, due notice of the filing of the affidavit in this case was ordered and issued, and in the return it is shown that the mother had been duly served by reading, and the court finds that both parents had notice of the proceeding and were present in court when the evidence was heard.

In view of these facts, showing that every opportunity was given appellants to be heard, and the further fact that no objection is made upon the

2. ground of the insufficiency of the evidence, appellants have no cause to complain because the court assumed jurisdiction over the parties.

Furthermore, the proceeding is a special statutory one to be made effective by the performance

3. of a particular duty enjoined upon a particular tribunal in a well-defined way and from the very nature of things a change of venue, as is provided for in the ordinary case between contending parties, could not have been contemplated by the legislature when the law was passed.

A guardianship duty rests upon the juvenile court so long as the child is a ward of the state, and if the court was required to grant a change of venue when-

ever demanded we might have a separate judge to act upon each separate case and possibly for each step to be taken after the child became such ward. This, with many other complications which would inevitably arise, would result only in confusion and difficulty. Consequently our legislature very wisely provided that one particular person, the regular judge of the juvenile court, should have and retain jurisdiction in cases of this special character, and if the parent was dissatisfied he could appeal from the judgment in a particular manner prescribed by statute. It was never intended that the rule which applies to changes of venue in suits generally should be applied to hearings of this special character. *Bowen v. Stewart* (1891), 128 Ind. 507, 510, 511, 26 N. E. 168, 28 N. E. 73.

We are of the opinion, therefore, that the information filed in this cause was substantially in proper form; that both parents had due notice of the

2. time and place of hearing the charges filed against them, and a full opportunity was given to be heard when they appeared in person with
4. said child. Therefore the regular judge of the juvenile court had jurisdiction over the subject-matter and of all parties concerned and the facts found fully warranted the judgment.

Judgment affirmed.

NOTE.—Reported in 118 N. E. 865.

BOYD ET AL. v. MILLER.

[No. 9,422. Filed November 1, 1917, Rehearing denied April 5, 1918. Transfer denied November 20, 1918.]

1. **APPEAL.—Review.—Harmless Error.—Admission of Evidence.—Cure by Instruction.**—In an action for the possession of real estate, error, if any, in permitting plaintiff, grantor of the land in controversy, to testify that she believed a line fence to be the boundary line and that it was her intention to sell only to the fence, was cured by an instruction expressly withdrawing evidence of that character from the jury's consideration. p. 457.
2. **BOUNDARIES.—Pleading.—Issues.—Grant in Accordance to Plat.**—In an action for the possession of real estate involving a boundary, if the only description of the realty in the pleadings was by reference to the official plat, there would be no issue as to an agreed boundary line, since the plat would control. p. 458.
3. **BOUNDARIES.—Pleading.—Issues.—Instructions.—Agreed Boundary.**—In an action for the possession of real estate involving a boundary, where the complaint alleged that a line fence was on the boundary line in controversy, that defendants bought with reference to the fence as a boundary and had used only to such fence, and that immediate and remote grantors of the parties to the action had recognized the fence as the true boundary, instructions as to the recognition of the fence as the boundary were within the issues. p. 459.
4. **BOUNDARIES.—Location.—Evidence.—Jury Question.**—In an action for possession of real estate involving a boundary line, evidence as to the length of time a fence had been in existence and the use and occupation of the realty in dispute with reference thereto and as to discrepancies between an original city plat and different surveys, held sufficient to present the issue whether such fence marked the boundary line in controversy. p. 460.
5. **BOUNDARIES.—What Constitutes.—Location.—Question of Law and Fact.**—What constitutes a boundary line is a question of law, but the location thereof is a question of fact. p. 462.
6. **BOUNDARIES.—Location.—Parol Evidence.—Admissibility.—Varying Deed.**—In an action for possession of real estate involving a boundary, where there was a dispute as to the width of several streets, evidence showing that there was a surplus in the block and that a certain fence was the true boundary between the lots involved, was not objectionable as tending to vary a deed conveying with reference to the plat, but was properly admitted to apply to the land conveyed thereby. p. 462.

Boyd v. Miller—68 Ind. App. 454.

7. **DEEDS.**—*Application of Description.*—*Parol Evidence.*—The purpose of a description in a deed is to furnish the means of identifying the lands conveyed and resort may be had to parol evidence to apply the description, render it intelligible and to give the conveyance the practical effect intended by the parties. p. 463.
8. **ESTOPPEL.**—*Estoppel by Deed.*—*Reference to Plats.*—*Effect.*—In an action involving a boundary line, where it appeared that plaintiff, the owner of two adjoining lots, conveyed one to defendants according to a certain original plat, and defendants denied an agreed boundary, but claimed under the deed, such plat became a part of the description in the deed and was binding on defendant, although later surveys shortened the block. p. 464.
9. **APPEAL.**—*Review.*—*Harmless Error.*—*Issues Without Pleadings.*—*Failure to Object.*—*Affirmance.*—Where issues not presented by the pleadings have been tried by the parties without objection and a correct result reached on any view of the case, and it affirmatively appears that intervening errors, if any, were harmless, the judgment will be affirmed. p. 465.

From La Porte Circuit Court; *Andrew J. Hickey*, Special Judge.

Action by Jennie F. Miller against Alexander A. Boyd and another. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

Cornelius R. Collins and *Jeremiah B. Collins*, for appellants.

Theron F. Miller, for appellee.

FELT, J:—Appellee brought this suit against appellants, who are husband and wife, for the possession of a certain portion of a lot in Michigan City, Indiana. The complaint was in two paragraphs, on which issues were joined by answer in general denial. A trial by jury resulted in a verdict for appellee.

Appellants moved for judgment on the answers of the jury to interrogatories, and for a new trial, both of which motions were overruled by the court. Judgment was rendered on the general verdict in favor of

appellee for possession of the real estate described in her complaint, and for costs.

The error assigned and relied on for reversal is the overruling of the motion for a new trial.

While many things are suggested in appellant's brief, it is difficult to ascertain the alleged errors upon which they rely for reversal of the judgment. Many preliminary and technical questions are discussed by both parties, which, in view of the ultimate conclusion reached, we deem it unnecessary to discuss.

Giving appellants the benefit of matter supplied by appellee's brief, and considering such questions as are sufficiently presented for due consideration, it appears that appellants rely upon alleged error in the admission of certain evidence, in the giving of certain instructions to the jury, and in refusing to give certain instructions tendered by them.

When this controversy arose, it appears that appellants owned the east half of lot 1, block 31, Elston's original survey of Michigan City, Indiana; that appellee owned the adjoining lot immediately south of appellants' lot, which is described as the north half of lot 4 in said block 31, both of which lots abut on Spring street in said city; that a partition fence had been maintained on said boundary line back from the street a distance of about eighty-three feet for many years, or since about 1882; that in October, 1914, appellants built a garage extending over and upon appellee's lot about two feet south of said fence for a distance of twelve feet. The strip so occupied gave rise to this suit.

Appellants predicate error on the ruling of the court in permitting appellee to testify that she believed the

fence to be the true boundary line, and that it

1. was her intention to sell the property within the fence line when she sold the east half of lot 1 to appellants. By an instruction given the jury the court expressly withdrew from its consideration evidence of this character, and told the jurors that in arriving at their verdict they should not weigh or consider the same. The error, if any, in admitting such evidence was rendered harmless by the instruction. *Shepard v. Goben* (1895), 142 Ind. 318, 321, 39 N. E. 506; *Louisville, etc., Traction Co. v. Leaf* (1907), 40 Ind. App. 214, 217, 79 N. E. 1066; *Madden v. State* (1897), 148 Ind. 183, 186, 47 N. E. 220; *Wishmier v. Behmyer* (1868), 30 Ind. 102.

Complaint is made of instructions Nos. 2 and 3 given by the court. Number 2 in substance told the jurors that evidence had been received relating to a certain line fence; that if they found from the evidence that the fence had been located by the owners of the adjoining lots and marked the boundary line between such lots and had been maintained as the true boundary line and is in fact the true line between said lots, appellants would have no right to take any portion of the ground south of the boundary line established and marked by such fence. Instruction No. 3 states in substance that, if the jury found from the evidence that the plaintiff and her grantors, and the defendants and their grantors, recognized the boundary line between their lots indicated by a fence, that if they found from the evidence that a fence had been on that identical line and had been recognized by plaintiffs and defendants and their immediate grantors, for a period of thirty years or more, as the true boundary

line between said lots, they should find for the plaintiff.

Appellants contend that the deed by which they acquired title conveyed to them the ground upon which the garage was built, and that appellee is absolutely bound by the description written therein; that there is no evidence tending to show that appellants had anything to do with the fence, or that there was any implied or express agreement on their part that the fence marked the boundary line of the lots, or that they recognized the same as indicating the true boundary line between their lot and appellee's lot immediately south thereof; that instructions Nos. 2 and 3 aforesaid are erroneous because there is no evidence which warranted the court in giving them to the jury; that the instructions authorized the jury to ignore the deed and return a verdict on parol evidence which tends to contradict the deed by showing a boundary line recognized or agreed upon by the parties.

Considering only the descriptions of the property by reference to the plat as set out in the complaint, the issues presented do not include that of an

2. agreed line. *Cole v. Gray* (1894), 139 Ind. 396, 407, 38 N. E. 856; *Gary Land Co. v. Griesel* (1913), 179 Ind. 204, 209, 100 N. E. 673. However, it is averred in each paragraph of the complaint that the fence removed by appellants was on the boundary line in controversy. It is also averred in the second paragraph of the complaint that the immediate and remote grantors of both appellants and appellee now maintain, and for more than thirty years last past have maintained, a fence between the aforesaid lots of the parties hereto; that appellee sold and appel-

lants bought with referenec to said fence as marking the boundary line between their said lots; that appellants took possession of and used their said lot up to the fence; that plaintiff is the owner of the north half of said lot 4 in block 31 of Elston's original survey of Michigan City, Indiana, "and of such land as is south of the aforesaid fence."

The record indicates some confusion as to the theory on which the case was tried. Appellants presented instructions which clearly recognized the issue of an agreement between the parties that the fence was on the boundary line.

The verdict of the jury describes the property, possession of which was recovered by appellee, with reference to the fence as follows: "Commencing on a point on the fence line between the east half of lot one (1), of block number thirty-one (31), of Elston's Original Survey of Michigan City, Indiana, and the north half of lot number four (4), block thirty-one (31), of Elston's Original Survey of Michigan City, Indiana, where the said fence line is intersected by the easterly wall of a certain garage; thence at right angles in a southerly direction a distance of two and one-tenths feet; thence at right angles in a westerly direction a distance of twelve feet; thence at right angles in a northerly direction a distance of two and one-tenths feet; thence in an easterly direction to the place of beginning."

No objection was made to the form of the verdict.

From the foregoing it appears that instruction No. 2 above set out was warranted by the issues, and was not harmful to appellant. No objection

3. was made to instruction No. 3 on the ground that it deals with the question of adverse pos-

session, but the objection is limited to the proposition that the instruction is not warranted by the evidence and authorized a verdict on parol evidence which tended to contradict the deed. This contention cannot be sustained.

The evidence tends to show that appellee acquired title to the east half of lot 1 in block 31, Elston's old survey of Michigan City, Indiana, in 1881; that

4. the same was conveyed to Ida F. Campbell in 1887, and reconveyed to appellee in 1896; that appellee conveyed the same lot to appellants in 1905; that in 1892, while the lot was owned by said Campbell, the fence between it and the north half of lot 4 in said block 31 owned by appellee was renewed by the owners, and by agreement of such owners the fence was placed on the identical line of the fence that had previously been erected and maintained as the boundary between such lots.

There was also evidence tending to show that there is a surplus of ground in block 31; that lines shown by the original plat of the city and by different surveys indicate some discrepancies; that a partition fence had been maintained on the same line as the fence which was between the lots in question in 1914, and that it had been so maintained from a date prior to 1887, by the successive owners of such lots; that such fence was in existence and was seen by appellants when they bought their lot from appellee in 1905; that appellants and appellee occupied, cultivated and otherwise used all the ground on their respective sides of such fence up to the fence, without objection, and without any claim or suggestion on the part of appellants or any other person that the fence was not the true boundary line, continuously

until October, 1914, when appellants, without notice to or permission of appellee, removed a part of said fence and erected a garage extending south of the fence line more than a foot.

The description in both of the deeds by which the parties to this suit claim title describe the lots as located in block 31 of Elston's original survey of Michigan City, Indiana. The plat of such survey was in evidence and designates the width of certain named streets, and states that "all the rest are 66 feet wide." Spring street ran along the east side of said block 31. Seventh street is on the north, and Eighth street on the south side of said block. According to this plat each of the streets aforesaid is sixty-six feet wide, though there is evidence tending to show some of the streets are 82½ feet wide, and that some of the fences are out in the street.

There was evidence showing that considering Seventh and Eighth streets as sixty-five feet wide, the true boundary line between said lots was about two and one-half feet north of said fence; that appellants have fenced on the front of the east half of lot 1, block 31, 88.4 feet, and that appellee had fenced in as half of lot 4, block 31, 39.1 feet.

Notwithstanding the deeds refer to Elston's survey, appellants contend that block 31 is not in such survey, and cite some later surveys and additions which, however, are not shown to annul or change the plat by which all the conveyances affecting the lots in question were made.

Appellants in their briefs concede that there is some confusion in the records relating to the original plat and subsequent surveys, but they entirely fail to

show that the original plat is invalid or that it is not in evidence in the case at bar.

On this state of the record we cannot say there is a total failure of evidence to show that the lots in controversy are in such survey or that the fence removed by appellants marks the true boundary line between the lots of appellants and appellee. *Rosenmeier v. Mahrenholz* (1912), 179 Ind. 467, 473, 101 N. E. 721, and cases cited; *Furst v. Satterfield* (1909), 44 Ind. App. 613, 617, 618, 89 N. E. 906; *Palmer v. Dosch* (1897), 148 Ind. 10, 13, 47 N. E. 176.

What constitutes a boundary line is a question

5. of law, but the location of such boundary line is a question of fact. In the case at bar both deeds describe the lots as being in the same
6. block of the same addition, the original survey of the town. The parties do not agree as to the effect of this survey or plat or subsequent surveys or subdivisions, nor as to the location or length of certain lines and the width of certain streets, which in a way bear on the questions in controversy in this suit. In this situation it was proper to hear evidence relating to the fence, the circumstances connected with appellants' purchase of the lot, the line recognized or agreed upon, and the several plats and surveys, and to submit to the jury for its determination from all the evidence bearing on the question the location of the boundary line in controversy. Such evidence is not received to vary or change the deed, but to enable the court to apply it to the subject-matter after the ambiguity or uncertainty has been removed by the determination of the question of fact by the jury, according to the true intent and meaning of the

contracting parties as evidenced by the deed and the attending conditions and circumstances.

It is not the office of a description to identify lands, but to furnish the means of identification.

Resort may be had to parol evidence to apply

7. the description, to render it intelligible and to give it the practical effect intended by the parties. *Scheible v. Slagle* (1883), 89 Ind. 323, 330; *Ayers v. Huddleston* (1903), 30 Ind. App. 242, 251, 66 N. E. 60; *Hunt v. Francis* (1854), 5 Ind. 302, 305; *Cleveland v. Obenchain* (1886), 107 Ind. 591, 598, 8 N. E. 624; *Richwine v. Jones* (1895), 140 Ind. 289, 290, 39 N. E. 460; *Caspar v. Jamison* (1889), 120 Ind. 58, 64, 21 N. E. 743; *Wingler v. Simpson* (1884), 93 Ind. 201, 204; *North v. Jones* (1913), 53 Ind. App. 203, 214, 100 N. E. 84; *Reid v. Klein* (1894), 138 Ind. 484, 495, 37 N. E. 967; *Lanman v. Crooker* (1884), 97 Ind. 163, 167, 49 Am. Rep. 437.

Appellants also contend that the court erred in giving to the jury instructions Nos. 7 and 8, because they are based on the idea of an agreement by the parties in interest, that the fence was the boundary line between their lots, and there is no evidence of such an agreement.

In the view of the case we are compelled to take, it is not necessary to determine whether there is or is not evidence tending to show an express or implied agreement binding upon the parties to this appeal as to the boundary line in controversy. But see 5 Cyc 930, 933; *Adams v. Betz* (1906), 167 Ind. 161, 169, 170, 78 N. E. 649; *Palmer v. Dosch*, *supra*; *Tate v. Foshee* (1889), 117 Ind. 322, 323, 20 N. E. 241; *Pitcher v. Dove* (1885), 99 Ind. 175, 179.

Appellants insist that the rights of the parties

must be determined from a consideration of the deeds, and that on this basis the judgment is

8. unwarranted. Appellants do not deny that the plat becomes a part of the description written in the deed, but in some indefinite way seek to hold appellee by the description in the deed and yet show that the width of the streets and the boundary lines of the lots in controversy are other than as shown in the plat on which the description is based.

The evidence is undisputed that, based on the original plat, the streets surrounding block 31 on the north, south and east sides are sixty-six feet wide, and that the line between said lots 1 and 4, block 31, instead of being south of the fence which has been maintained as above stated is two and one-half feet north thereof. While there was some evidence tending to show that said streets as they now appear are 82½ feet wide, there was also evidence of a surplusage of ground in block 31.

In answer to interrogatories the jury stated that Seventh and Eighth streets were 82½ feet wide, but in answer to the questions whether such streets were 82½ feet wide according to the measurements of the original Elston's survey the jury answered in the negative. It also answered that the south line of Seventh street and the north line of Eighth street as they now appear are different from such lines as designated in said original survey. The jury also found in answer to an interrogatory that according to the measurements of the original Elston's survey as shown by the plat there was a surplusage of nineteen feet.

Appellee did not claim any ground north of the fence, and the verdict above set out shows that she

only recovered possession of that part of the lot south of the fence upon which appellants had placed their garage.

Considering the case from the standpoint of appellants' claim and the result reached, it is evident that appellants have no cause to complain, and could not have been harmed by any of the instructions complained of, for, as the case is presented to this court, under the undisputed evidence, and on appellants' own theory, appellee is clearly entitled to all she recovered, and appellants still retain ground that under the rule invoked, if carried to its logical conclusion, based on the descriptions in the deed, would show the true boundary line to be north, instead of south, of the fence as asserted by appellants.

Where the result reached is clearly right on any view of the case, and it affirmatively appears that the appellants have not been harmed by interven-

9. ing errors, if any, the judgment will be affirmed. *Indianapolis St. R. Co. v. Schomberg* (1904), 164 Ind. 111, 114, 72 N. E. 1041; *Mason v. State* (1908), 170 Ind. 195, 203, 83 N. E. 613; *McNight v. Kingsley* (1911), 48 Ind. App. 372, 378, 92 N. E. 743; *St. Clair v. Princeton Coal, etc., Co.* (1912), 50 Ind. App. 269, 271, 98 N. E. 197; *First Nat. Bank v. Ransford* (1914), 55 Ind. App. 663, 668, 104 N. E. 604.

The same result follows where issues not presented by the pleadings have been tried by the parties without objection and a correct result reached. *Driscoll v. Penrod* (1911), 176 Ind. 19, 25, 95 N. E. 313; *Louisville, etc., Traction Co. v. Lottich* (1915), 59 Ind. App. 426, 435, 106 N. E. 903; *Shedd v. American Maize,*

John A. Schumaker Co. v. Kendrew—68 Ind. App. 486.

etc., Co. (1915), 60 Ind. App. 146, 163, 108 N. E. 610.

Judgment affirmed.

Hottel, C. J., Ibach, P. J., Dausman, Caldwell and Batman, JJ., concur.

NOTE.—Reported in 117 N. E. 559.

JOHN A. SCHUMAKER COMPANY ET AL. v. KENDREW.

[No. 10,317. Filed November 20, 1918.]

1. MASTER AND SERVANT.—*Workmen's Compensation Act.—Medical and Hospital Expenses.—Liability of Employer.—Statute.*—Under §25 of the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, providing that during the thirty days after an injury the employer shall furnish free of charge to an injured employe an attending physician and such surgical and hospital service and supplies as may be deemed necessary by the physician, or the Industrial Board, where an injured employe was furnished medical attention during the weeks following the accident, but after apparent recovery and several months subsequently to the accident a tumor developed requiring further medical attention, the employer was not liable therefor, since the act limits the liability for medical treatment to a period covered by the first thirty days after the injury and does not require treatment by a physician as the development of an injury may from time to time make necessary, nor does it contemplate full thirty days treatment intermittent in character and given at such time as the progressive development of an injury may require. (*In re McCaskey* [1917], 65 Ind. App. 349, distinguished.) pp. 468, 473.
2. STATUTES.—*Construction.—Purpose and Scope.*—In construing an act its general purpose will be considered. p. 472.
3. MASTER AND SERVANT.—*Workmen's Compensation Act.—Medical Expenses.—Liability.—Statute.*—When an injury resulting from an accident is such that both the injured employe and the employer at the time regard it as one of little or no consequence and as not requiring the attention of a physician and as not of the kind or character contemplated by the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, and later developments show an injury coming within the act, and

John A. Schumaker Co. v. Kendrew—68 Ind. App. 466.

requiring medical attention the date for computing the thirty days during which medical attention must be furnished under §25 of the act is the date when the injury develops within the meaning of the act, even though the development of such injury is delayed thirty days or more after the happening of the accident which causes it. p. 472.

From the Industrial Board of Indiana.

Proceedings under the Workmen's Compensation Act by John Kendrew against the John A. Schumaker Company and others. From an independent order of the Industrial Board allowing applicant a sum for hospital and surgical expenses in addition to compensation, the defendants appeal. *Reversed.*

Fesler, Elam & Young, for appellants.

HOTTEL, J.—This is an appeal from an award of the Industrial Board of Indiana in which it approved a claim filed by appellee for medical and hospital expenses incurred and paid by him seven months after the accident which resulted in his injury. The undisputed facts pertinent to the question involved, as disclosed by the stipulations of the parties and the findings of the board, are as follows: On August 31, 1916, appellee was in the employ of appellant Schumaker company, and, on that day, received a personal injury by an accident "arising out of and in the course of his employment, which at the time consisted apparently of a surface bruise on the left leg below the knee." As a result of said injury, appellee was disabled for work for a period of one week, and was, at the time, provided with a physician furnished by appellants. This physician attended appellee on August 31, 1916, and on September 2, 1916, and on said occasions treated the surface bruise on appellee's left leg, which was then the only injury sus-

ceptible of diagnosis. This treatment was of a character such as the apparent injury required and was all that said injury appeared to require. The physician was paid in full by the employer. Afterwards, as a result of the injury sustained on August 31, 1916, a tumor or bursa developed in the deeper structures of appellee's left leg, which became "so pronounced that it was diagnosed as such on the 28th day of March, 1917." Appellee then informed the foreman under whom he worked of the condition of his leg, but appellants did not furnish him with the necessary surgical or hospital supplies and services required for the treatment of his injury as then diagnosed. Appellee thereupon provided the proper treatment at an expense to himself of \$35 for surgical services and \$65 for hospital charges, no part of which has been repaid to him by appellants. The parties agreed to a compensation allowance of \$12.90 a week, beginning on April 11, 1917, and continuing during total disability, not to exceed 500 weeks, and it is from an independent order of the Industrial Board, allowing appellee the further sum of \$90 for hospital and surgical expenses, that this appeal is prosecuted.

It is contended by appellants that on the expiration of thirty days from August 31, 1916, their liability to furnish an attending physician and to pro-

1. vide hospital service ceased; and that this is so notwithstanding the admitted facts showing that, after the slight injury which was discovered and treated at the time of and immediately following the accident, there later developed as a direct result thereof a more serious condition which was not susceptible of diagnosis and treatment during the period of the first attendance of the physician. Appellants

John A. Schumaker Co. v. Kendrew—68 Ind. App. 466.

rely on and cite the following cases in support of their contention: *In re Henderson* (1917), 64 Ind. App. 581, 116 N. E. 315; *Born & Co. v. Durr* (1917), 64 Ind. App. 643, 116 N. E. 428; *Epsten v. Hancock-Epsten Co.* (1917), 101 Neb. 442, 163 N. W. 767; *McMullen v. Gavette Construction Co.* (1918), 200 Mich. 203, 166 N. W. 1019; *Carroll's Case* (1916), 225 Mass. 203, 114 N. E. 285.

We deem it unnecessary to enter into a lengthy discussion of the question here presented or of the cases cited by appellants in support of their contention, since we are of the opinion that their position is sustained by the language of the Workmen's Compensation Act. Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918. Section 25 of that act provides that: "During *the* thirty days after an injury the employer shall furnish or cause to be furnished free of charge to the injured employe, * * * an attending physician; * * * and in addition such surgical and hospital service and supplies as may be deemed necessary by said attending physician, or the Industrial Board." It is further provided in the same section that: "If in an emergency (or) on account of the employer's failure to provide the medical care for the *first* thirty days, *as herein specified*, or for other good reason, a physician other than that provided by the employer is called to treat the injured employe during the first thirty days, the reasonable cost of such service shall be paid by the employer subject to the approval of the Industrial Board." (Our italics.)

It will be observed that this act does not provide for or require such emergency or other treatment by a physician as the development of an injury may from time to time make necessary, nor does it require or

contemplate full thirty days' treatment, intermittent in character and given at such times as the progressive development of an injury may require. On the contrary, the act specifically limits the liability for medical treatment to a period covered by the *first* thirty days after the injury. We find nothing in the act under consideration, or in the authorities construing that act or similar acts in other jurisdictions, which can be said to warrant a holding that, in order to cover the different phases of a progressive injury, the period of medical treatment at the expense of the employer may be divided into parts, some of which may reach into a period beyond the first thirty days following the injury. This court has given to the section under consideration an interpretation which, impliedly, if not expressly, holds to the contrary. *In re Henderson, supra; Born & Co. v. Durr, supra.*

In this connection, the case of *In re McCaskey* (1917), 65 Ind. App. 349, 117 N. E. 268, is referred to by appellant, and, although it is not contended that said case is controlling in the present instance, the suggestion is made that an erroneous rule or principle is announced therein and should be modified in this opinion, which involves the same principle. The contention is that in the McCaskey case this court erroneously held that under the Workmen's Compensation Act an "injury" occurs only at the time of disability, whereas, in fact, a proper interpretation of said act makes the injury concurrent in point of time with the "accident" which causes it, and that any period of time which runs from the date of the injury must necessarily run from the date of the accident which causes that injury. Appellants' statement of the holding in the McCaskey case is rather broad,

John A. Schumaker Co. v. Kendrew—68 Ind. App. 466.

but we recognize that there is authority which tends to support their contention as to a proper interpretation of the compensation act. *Duffy v. Town of Brookline* (1917), 226 Mass. 131, 115 N. E. 248; *Carroll's Case*, *supra*; *McMullen v. Gavette Construction Co.*, *supra*; *Cooke v. Holland Furnace Co.* (1918), 200 Mich. 192, 166 N. W. 1017; *Smith v. Solvay Process Co.* (1917), 100 Kan. 40, 163 Pac. 645.

In the McCaskey case we directed attention to the fact that, in fixing the period during which the employer should furnish medical service for an injured employe, the legislature has designated the thirty days following the injury rather than the thirty days following the accident, and we there said, at page 354 of the opinion: "The language of the statute, and justice and reason alike, authorize the conclusion that the services of an attending physician for which compensation was intended was a service to be rendered after there was an actual known physical injury, and hence where, as in this case, the undisputed facts show an accident to an employe in the presence of his employer, the immediate effects of which are not such as to indicate to either employer or employe, any disability within the meaning of the act in question or any injury requiring the services of an attending physician as provided in said act, and such physician is, at the time, neither asked for nor called by the employe, nor furnished by the employer, and it turns out later that the injury resulting from such accident is more serious than was at first thought, and is in fact such as results in a disability of the employe within the meaning of the statute here involved, the thirty-day period during which the employer must, under said §25 of this act, *supra*, furnish

an attending physician begins to run when the disability to the employe within the meaning of the act in question develops from such injury."

The effect of this holding is to say that the word "injury," as used in §25, means an injury which results in a disability contemplated by the compensation act, and that so long as such injury is one which both the employer and the employe regard and treat as not requiring the services of a physician, and therefore not contemplated or covered by the provisions of §25, it should likewise be so treated by the Industrial Board; that in such a case the period during which an attending physician must be provided begins to run when an actual disability to the employe, within the meaning of the act, develops from such injury. This holding, if §25 alone is looked to, may appear to be open to the criticism that it is judicial legislation, but we think that this objection disappears when the entire act, and its purpose and scope, are taken into account. In construing any act

its general purpose and scope should not be

2. overlooked, and there can be no doubt but that the purpose and scope of the act in question is to cover and provide compensation for those

3. injuries alone which result in disability to the employe, and that the word "injury," as used in §25 of said act, is to be so construed. It seems to us to be in perfect and complete harmony with the intent, purpose and spirit of the act, and not necessarily out of harmony with the letter thereof, to say that when the injury resulting from an accident is such that both the injured employe and the employer, at the time, regard and treat it as one of little or no consequence and as not requiring the attention of a

physician and as not of the kind or character contemplated by the act, and later developments show an injury which does fall within the scope of said act and one which does require the services of a physician or surgeon, the date for computing the time from which medical attention must be furnished, in such a case as in all others, is the date when the "injury" develops within the meaning of the act, and this is so even though the development of such an injury is delayed thirty days or more after the happening of the accident which causes it. We see no reason or occasion, therefore, for overruling or modifying the opinion in the McCaskey case. There

1. is nothing in that case, however, that can be said to support the conclusions reached by the Industrial Board in the present instance. The facts agreed on by the parties and the finding of the board itself show that there was an "injury" at the time of the accident which required and received the attention of a physician, and, for the purposes of this case, the time of the injury and the time of the accident are concurrent. In cases where such events are not concurrent and are not the subject of agreement, their determination, of course, presents issues of fact for the consideration of the board, but in this case no such issue is presented. The thirty-day period here began to run on August 31, 1916, and there is no authority in the statute, express or implied, which authorizes an allowance for the expense of a physician or hospital service incurred more than thirty days thereafter.

The award of the Industrial Board is therefore reversed.

INDIAN CREEK COAL AND MINING COMPANY v. CALVERT
ET AL.

[No. 10,129. Filed May 17, 1918. Rehearing denied November 20, 1918.]

1. MASTER AND SERVANT.—*Workmen's Compensation Act.—Appeal.—Sufficiency of Evidence.—Scope of Review.*—On an appeal from an award of compensation under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, only where in determining the sufficiency of the evidence to sustain the award, will consider only the evidence favorable to appellees, together with all favorable inferences deducible therefrom. p. 479.
2. MASTER AND SERVANT.—*Workmen's Compensation Act.—Injury in Course of Employment.*—In a proceeding under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, for compensation for the death of a servant, where it appeared that decedent, a coal miner, died from a ruptured aorta, which was diseased, shortly after extraordinary exertion in attempting to move a heavy coal car, the injury occurred in the course of the employment. p. 479.
3. MASTER AND SERVANT.—*Workmen's Compensation Act.—Death Due to Disease.—Right to Compensation.*—The fact that a servant is afflicted with a fatal malady is sufficient to defeat a claim for compensation for his death under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, the court his decease was in part the result of his ailment progressing naturally and disassociated from any injury that he may have suffered by accident arising out of and in the course of employment, but if such an injury concurs with the ailment in hastening the disease to a fatal termination, the right to an award exists. p. 480.
4. MASTER AND SERVANT.—*Workmen's Compensation Act.—Death of Servant.—Award.—Evidence.—Sufficiency.*—In a proceedings under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, for the death of a servant, evidence showing that decedent was afflicted with a disease of the aorta which resulted in the walls thereof becoming weaker and unnaturally thin, that, shortly after deceased had exerted himself extraordinarily in attempting to move a heavy coal car, became ill and died, death resulting from a rupture of the aorta, and that any excitement or exertion might cause such a rupture, is sufficient to sustain a finding that the injury was by accident arising out of the employment. pp. 481, 483, 495.

Indian Creek Coal, etc., Co. v. Calvert—68 Ind. App. 474.

5. **MASTER AND SERVANT.—***Workmen's Compensation Act.—Accident.*—The word accident, as used in workmen's compensation acts, is employed in its popular sense, and means any unlooked for mishap or untoward event not expected or designed. p. 482.
6. **MASTER AND SERVANT.—***Workmen's Compensation Act.—Personal Injury.*—A personal injury, as the term is used in the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, refers not to some break in some part of the body or wound thereon, or the like, but rather to the consequence or disability that results therefrom. p. 495.
7. **EVIDENCE.—***Proof by Inference.—Inferences Based on Inferences.*—Although it is not permissible, for the purpose of supporting a proposition, to draw an inference from a deduction which is itself purposely speculative and unsupported by an established fact, since at the beginning of every line of legitimate inferences there must be a fact, known or proved, yet, where there is such a fact, it is the duty of the court to draw thereupon the most reasonable legitimate inferences and an inference so drawn merges itself into the proved fact, which may be a basis for other proper inferences. p. 495.

From the Industrial Board of Indiana.

Proceedings for compensation under the Workmen's Compensation Act by Laura Calvert and others against the Indian Creek Coal and Mining Company. From an award for applicants, the defendant appeals. *Affirmed.*

Charles E. Henderson and *James L. Murray*, for appellant.

LeRoy M. Wade and *Arnold J. Padgett*, for appellees.

CALDWELL, J.—The sole question presented by this appeal is whether the evidence was sufficient to sustain the finding of the Industrial Board that the death of Addison Calvert, of whom appellees were dependents, was the result of a personal injury "by accident arising out of and in the course of" his employment, within the meaning of the Workmen's Compen-

sation Act. Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918.

The evidence most favorable to appellees' cause, and which for the most part was uncontradicted, is to the following effect: On and for some time prior to January 3, 1917, decedent was in appellant's employ as a coal miner. As a rule he worked regularly when the mine was running. When the mine was not running he worked at the blacksmith's trade doing repair work, and also at times as a section hand on the railroad. His friends and acquaintances regarded him as a strong healthy man, and had no knowledge that he had any physical ailment. Prior to January 3, 1917, he had not required the services of a physician at any time. Occasionally, however, when coughing, he complained that his side hurt him. Periodically or occasionally he indulged in the use of intoxicants excessively, and at such times he laid off from work for a few days. At 7 o'clock on the morning of January 3, 1917, he went to work in room 12 of appellant's mine. His son, aged twenty-five, was working with him. About 8 o'clock, having a quantity of coal ready to load, he and his son went into room 11, adjoining room 12, for the purpose of shoving a partly loaded car from the former to the latter. The track extended from room 11 up grade for a distance, and then down grade into room 12. Decedent and his son attempted to push the car up over the grade, but found it too heavy for their strength. The son then called two other miners, Mr. Snap and his son, who were working in a room adjoining room 11, to come and assist in moving the car. The four workmen pushed the car up over the top of the grade. Snap and his son returned to

their work and decedent and his son moved the car down grade into No. 12. Mr. Snap testified that when they came to assist decedent and his son, decedent "was talking the same as he always had—was cutting up and was all right as far as I knew anything about it—as far as I could tell he was a strong, hearty looking man," but that eventually "when we pushed the car on the switch there, he said 'Oh, my side' and he just went on and he never said anything more, and we just left and went back to our working place." Decedent and his son moved the car down the grade into room 12, and commenced to load it. The further account of the occurrence, as testified to by the son, is as follows: "He was on one side of the car and I on the other. I heard him holler 'Oh.' He was leaning against the car holding his side, and I kept asking him what was the matter, and he says 'I don't know,' and kept saying 'Oh, my side.' He had his hand on his left side. He said 'Take me over to the other side of the car and lay me down.' I went around and he leaned against me and I helped him around the corner of the car and laid him down on a slack pile. He wanted a drink of water and I got my bucket and gave him the water, but he said he couldn't drink it." The son then went and got Mr. Snap and his son to stay with decedent while he went for help. Mr. Snap testified that: After returning from helping to push the car, "I don't believe we threw over a half dozen shovels in our car until his son came and hollered and we went into their room and found his father lying down on slack, holding his hand over his heart." Decedent died in the company's office at about 10:45 the same morning. When the collapse came decedent was loading coal in the ordinary way.

He had just lifted a chunk of coal weighing thirty-five or forty pounds. The miners frequently loaded lumps weighing 75 to 100 pounds. The scoop that he was using weighed about 25 pounds loaded.

An autopsy was held on the body of decedent. It disclosed that the descending aorta had ruptured on the right side at a point about two inches below the arch; that a diseased condition existed at the point of rupture indicated by an unnatural thinness of the wall. There was expert medical evidence to the following effect: That such a diseased condition might result from any one of a number of causes, as chronic alcoholism, or a tubercular focus in one or more of the mediastinal glands lying next to the arterial wall; that the latter was probably the cause of the diseased condition as it existed in decedent; that there was no way to determine how long the thinning process had been going on; that it might have been several days or several weeks; that it is probable that the thinning process had been going on for several weeks; that when such a condition is caused by a tubercular focus, there will be a perforation with fatal hemorrhage sooner or later if the tubercular focus continues; that when such a condition exists any exertion or excitement which makes the heart beat more rapidly may produce a rupture; as the thinning continues a rupture might come while the patient is coughing or laughing, or performing ordinary work, or sleeping, or sitting still. A medical witness, who participated in the autopsy, gave it as his opinion that: "From the appearance of the wall and the condition we found there, it looked as though it might have been caused by a strain or exertion of some kind."

In determining the questions presented, since the finding of the board was in favor of appellees, we are required to consider only the evidence favor-

1. able to them as above outlined, together with all inferences reasonably deducible therefrom and favorable to their cause. The following is either directly established by or reasonably deducible from the evidence: That the shoving of the partially loaded car up over the grade required of decedent, and that he actually exerted, an unusual physical effort, both when assisted by his son alone and also when assisted by the Snaps in addition; as based on the expert evidence that such would be the effect, that such effort augmented the speed and increased the force of decedent's heart beats with the consequent added internal pressure on his diseased and weakened blood vessels; that the rupture of the aorta followed very shortly after the moving of the car, as indicated by the fact that the Snaps had thrown only about a half dozen shovels of coal until summoned back to decedent's assistance; and that such pressure on his blood vessels, induced as aforesaid, continued as a causative force until it terminated in the rupture; that the decedent became somewhat abnormal in physical condition while pushing the car, as indicated by his first outcry and his changed demeanor continuing thereafter, and that it is not improbable that the process of rupturing the aorta may have commenced when the car was being pushed.

Under the facts there can be no doubt that decedent suffered a personal injury, the rupture of the aorta, in the course of his employment, and

2. that such personal injury speedily resulted in his death. We proceed to determine whether

such personal injury was by accident arising out of the employment.

It is apparent from the evidence that decedent was afflicted with a very serious physical ailment.

His ailment, however, was not necessarily in-

3. curable or of such a nature that it was certain to terminate fatally. Under the expert evidence such ailment was certain to terminate fatally only in case of the continuance of the producing cause which was not certainly known. His ailment, however, was such that it was not improbable that at any time, sooner or later, there might be a rupture of the aorta and a consequent death. But assuming that decedent was afflicted with a fatal malady certain to result in his decease sooner or later, and that such malady was a cause of decedent's death here, these facts alone are not sufficient to defeat appellees' claim. Such result would follow only in case his decease was in fact the result of his ailment progressing naturally and disassociated from any injury that he may have suffered by accident arising out of and in the course of his employment. If there was such an injury, and it concurred with the ailment in hastening the latter to a fatal termination, then the right to an award exists. On this subject the doctrine adopted by this court is thus expressed: "The courts, consistent with the theory of workmen's compensation acts, hold with practical uniformity that, where an employe afflicted with disease receives a personal injury under such circumstances as that he might have appealed to the act for relief on account of the injury had there been no disease involved, but the disease as it in fact exists is by the injury materially aggravated or accelerated, resulting in disabil-

ity or death earlier than would have otherwise occurred, and the disability or death does not result from the disease alone progressing naturally as it would have done under ordinary conditions, but the injury, aggravating and accelerating its progress, materially contributes to hasten its culmination in disability or death, there may be an award under the compensation acts." *In re Bowers* (1917), 65 Ind. App. 128, 133, 116 N. E. 842.

Under the evidence here it is apparent that decedent's malady was an active and potent agency in causing his death. The question for our de-

4. termination is whether it may be said from the evidence that he suffered an injury by accident arising out of his employment which concurred with his malady as an additional agency, or which rendered the latter effective to a fatal end. That is, was decedent's death caused solely by his disease progressing naturally, or did he suffer an accident arising out of his employment which concurred with his malady to produce the tragedy which terminated his life? In determining this question the meaning of the word "accident," as used in the act, is important.

On the suggested question appellees point to *Haskell, etc., Car Co. v. Brown* (1918), 67 Ind. App. 178, 117 N. E. 555, as conclusive. That case is at least closely analogous to the case at bar. There the evidence disclosed that Brown after a somewhat heavy lift suddenly became ill, and that his illness shortly terminated fatally. There was evidence that he had a pre-existing weakened condition of an artery, and that the physical effort of lifting a heavy load produced a sudden arterial dilation, known as

an aneurism, which caused his death. It is held in that case in effect that the evidence justified the conclusion that Brown suffered a personal injury by accident arising out of and in the course of his employment, which concurred with his ailment to produce his death, and that the award of the board should be affirmed. We regard that decision as at least very persuasive of the correctness of the board's determination here. Appellant, however, insists that the facts in that case were very different from those in the case at bar. We regard the facts there as differing rather in degree than in kind from those here. However, by reason of appellant's insistence, we look further into the decided cases.

In the Brown case there are authorities cited to the effect that this court is committed to the doctrine that the words "by accident arising out of and

5. in the course of the employment," as used in the Workmen's Compensation Act, should be liberally construed in harmony with the humane purposes of the act. In that case this court adopted as sound those decisions which hold that the word "accident," as it occurs in compensation acts, is used in its popular sense, and means "any unlooked for mishap or untoward event not expected or designed." In addition to the authorities there cited, see the following: *Vennen v. New Dells Lumber Co.* (1915), 161 Wis. 370, 154 N. W. 640, L. R. A. 1916A 273; *Bystrom Bros. v. Jacobson* (1916), 162 Wis. 180, 155 N. W. 919, L. R. A. 1916D 966; *Adams v. Acme White Lead, etc., Works* (1914), 182 Mich. 157, 148 N. W. 485, L. R. A. 1916A 283, Ann. Cas. 1916D 689; *Southwestern Surety Ins. Co. v. Pillsbury* (1916), 172 Cal. 768, 158 Pac. 762; *Clover, etc., Co. v. Hughes* (1910), L. R. A. C. 242, 3 B. W. C. C. 275.

Indian Creek Coal, etc., Co. v. Calvert—68 Ind. App. 474.

The meaning assigned to the word "accident," as used in compensation acts, must be distinguished from its meaning as used in accident insurance policies. *Southwestern Surety Ins. Co. v. Pillsbury, supra; Robbins v. Original Gas Engine Co.* (1916), 191 Mich. 122, 157 N. W. 437; *Fenton v. J. Thorley & Co.* (1903), 19 T. L. R. 684, 5 W. C. C. 1.

For the meaning assigned to the word as used in the latter relation, see *United States Casualty Co. v. Griffiths* (1917), 186 Ind. 126, 114 N. E. 83, L. R. A. 1917F 481; *Schmid v. Indiana, etc., Accident Assn. Co.* (1908), 42 Ind. App. 483, 85 N. E. 1032; *United States, etc., Assn. v. Barry* (1888), 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60.

Under the authorities, and especially the more recent ones, there can be but little doubt that the word "accident," as used in compensation laws, is

4. correctly defined by this court in the Brown case. More difficulty arises in seeking to apply the definition to specific facts.

One of the earlier cases defining the word "accident," as defined by this court in the Brown case, is *Fenton v. J. Thorley & Co., supra*, decided by the British House of Lords in 1903. In that case Fenton in the course of his employment was required at stated intervals to move a level and turn a wheel connected with a certain press, for the purpose of thereby raising a lid that the contents of the press might be removed. On one occasion the wheel would not turn, whereupon he called a fellow workman to his assistance, and while attempting to move the wheel by their combined efforts, Fenton felt something which he described as a "tear" on his "inside," and it was discovered that he was ruptured. The House of

Lords, reversing the Court of Appeal and the county court, held that Fenton's injury was the result of an accident, and that he was entitled to compensation under the English act. In the course of his opinion Lord Macnaghten said: "There was no evidence of any slip, or wrench, or sudden jerk. It may be taken that the injury occurred while the man was engaged in his ordinary work, and in doing or trying to do the very thing which he meant to accomplish. * * * If a man, in lifting a weight or trying to move something not easily moved, were to strain a muscle, or rick his back, or rupture himself, the mishap in ordinary parlance would be described as an accident. Anybody would say that the man had met with an accident in lifting a weight, or trying to move something too heavy for him. * * * A man injures himself by doing some stupid thing, and it is called an accident, and he gets the benefit of the insurance. It may even be his own fault, and yet compensation is not to be disallowed unless the injury is attributable to 'serious and wilful misconduct' on his part. A man injures himself suddenly and unexpectedly by throwing all his might and all his strength and all his energy into his work by doing his very best and utmost for his employer, not sparing himself or taking thought of what may come upon him, and then he is to be told that his case is outside the Act because he exerted himself deliberately, and there was an entire lack of the fortuitous element. I cannot think that that is right."

Lord Shand said in the course of his opinion: "I think it (accident) denotes or includes any unexpected personal injury resulting to the workman in the course of his employment from any unlooked for mishap or occurrence."

Lord Robertson said: "No one out of a law court would ever hesitate to say that this man met with an accident; and, when all is said, I think this use of the word is perfectly right. The word 'accident' is not made inappropriate by the fact that the man hurt himself. * * * Suppose the wheel had yielded and been broken by exactly the same act, surely the breakage would be rightly described as accidental. Yet the argument against the application of the Act is in this case exactly the same, that there is nothing accidental in the matter, as the man did what he intended to do. The fallacy of the argument lies in leaving out of account the miscalculation of forces, or inadvertence about them, which is the element of mischance, mishap, or misadventure."

The Fenton case disapproves *Hensey v. White* (1899), 2 W. C. C. 1, and the decisions in which that case has been followed, including *Roper v. Greenwood* (1900), 3 W. C. C. 23, the last named decided by the court of appeal. In the former, Hensey, while lifting up on a large fly wheel for the purpose of starting a gas engine, ruptured a blood vessel of his stomach, and as a consequence died from loss of blood. A *post mortem* disclosed a diseased condition, which had weakened the blood vessels of the stomach. The court of appeal held that the element of accident was entirely wanting; that: "The injury arose in the ordinary course of the deceased man's work, though there might have been a little more exertion used by him in that work on the occasion in question than was usual." In the Roper case a woman suffering from prolapsus uteri was employed to do work that necessitated her lifting boxes which she knew were too heavy for her strength. With such knowledge

she continued the work, and, in attempting to lift a box, suffered a strain which aggravated her injury. The court of appeals, affirming the county court, held that there was no accident, being influenced somewhat apparently by the element of the knowledge of the woman, and the further element that the county court had determined the question as one of fact. Each of these cases, as we have said, was disapproved by the House of Lords in the Fenton case.

In the Fenton case *Stewart v. Wilsons, etc., Coal Co.*, 5 F. 120, decided by the Court of Sessions of Scotland in 1903, is cited with approval, the court by Lord Macnaghten saying that in that case: "A miner strained his back in replacing a derailed coal hutch. The question arose, Was that an accident? All the learned judges held that it was * * *. What the miner did in replacing the hutch he certainly did deliberately and in the ordinary course of his work. There was nothing haphazard about it. Lord McLaren observed that it was impossible to limit the scope of the statute. He considered that 'if a workman in the reasonable performance of his duties sustains a physiological injury as the result of the work he is engaged in' . . . 'this is accidental injury in the same sense of the statute.' Lord Kinnear observed that the injury was 'not intentional,' and that 'it was unforeseen. It arose,' he said, 'from some causes which are not definitely ascertained, except that the appellant was lifting hutches which were too heavy for him. If,' he added, 'such an occurrence as this cannot be described in ordinary language as an accident, I do not know how otherwise to describe it.' "

In *Fulford v. Northeast Coal, etc., Co.* (1907), 1

B. W. C. C. 222, Fulford, a chalk miner, was slightly ruptured when he commenced work for the defendant company. One morning, after several months' service, he attempted to remove with a pick a lump of chalk of unusual size, but not larger than lumps that he had frequently theretofore removed. As a result of the effort his rupture was aggravated, and as a consequence he was incapacitated for work. The court in deciding the case said in substance that, although what the man was doing, he was doing deliberately, and that nothing happened outside the ordinary course of the work which caused the injury, nevertheless, the injury was suffered by accident within the meaning of the English act. The court then said in substance that the fact that from a medical viewpoint the injury could not be said to have been unexpected when measured by the workman's condition and the thing done was not controlling.

Clover, etc., Co. v. Hughes, supra, decided by the House of Lords in 1910, affirming the judgment of the county court that the injury involved was by accident arising out of the employment, is to the same effect, and is also very closely in point here. The facts as outlined by Lord Loreburn, and as forming the basis of the decision, were in substance as follows: Hughes, a workman, was suffering from an aneurism in so advanced a stage that it might have burst at any time, as while he was asleep, and a very slight exertion or strain would have been sufficient to bring about a rupture of the blood vessel involved. In the course of his employment, Hughes was tightening a nut with a wrench, when the strain "quite ordinary in this quite ordinary work" ruptured the aneurism,

and he died. “ ‘The death was caused by a strain arising out of the ordinary work of the deceased operating upon a condition of body which was such as to render the strain fatal.’ ” The court adopted the finding of the county court that there was not sufficient evidence to establish that the workman had slipped. In discussing whether the county court was justified in holding that the rupture was an accident within the meaning of the British act, Lord Loreburn said: “Certainly it was an ‘untoward event.’ It was not designed. It was unexpected in what seems to me the relevant sense, namely, that a sensible man who knew the nature of the work would not have expected it. I cannot agree with the argument presented to your Lordships that you are to ask whether a doctor acquainted with the man’s condition would have expected it.” And after stating that popularly the fact that something goes wrong within the human frame is associated with the idea of the accidental, he said: “If that occurred when he was lifting a weight it would be properly described as an accident. So, I think, rupturing an aneurism when tightening a nut with a spanner (wrench) may be regarded as an accident. It cannot be disputed that the fatal injury was in this case due to this accident, the rupture of the aneurism.” In discussing whether the accident arose out of the employment he said: “I do not think we should attach any importance to the fact that there was no strain or exertion out of the ordinary. It is found by the county court judge that the strain in fact caused a rupture, meaning, no doubt, that if it had not been for the strain, the rupture would not have occurred when it did. If the degree of exertion beyond what is usual

had to be considered in these cases, there must be some standard of exertion, varying in every trade. Nor do I think we should attach any importance to the fact that this man's health was as described. If the state of his health had to be considered, there must be some standard of health, varying, I suppose, with men of different ages. An accident arises out of the employment when the required exertion producing the accident is too great for the man undertaking the work, whatever the degree of exertion or condition of health." And on the proposition whether the mere fact that a man's disease kills him while he is at work entitles him to compensation, he said: "I do not think so, and for this reason. It may be that the work has not, as a matter of substance, contributed to the accident, though in fact the accident happened while he was working. In each case the arbitrator ought to consider whether, in substance, as far as he can judge on such a matter, the accident came from the disease alone, so that whatever the man had been doing it would probably have come all the same, or whether the employment contributed to it." Lord Macnaghten, concurring, said: "The fact that the man's condition predisposed him to such an accident seems to me to be immaterial. The work was ordinary work; but it was too heavy for him. It must be taken on the finding of the learned county court judge that the accident was unexpected by the workman. * * * The fact that the result would have been expected, or indeed contemplated as a certainty, by a medical man of ordinary skill if he had diagnosed the case, is, I think, nothing to the purpose. An occurrence, I think, is unexpected, if it is not expected by the man who suffers by it."

In the Hughes case, and others which we have discussed, the question was squarely presented whether where a malady with which a workman is afflicted, unexpectedly to him terminates in his disability or death, while engaged in his ordinary work in the ordinary way, the concurring causes being the disease and the work, the effect of the latter aggravating the former to its serious or fatal consequences, the involved injury may be said to be by accident arising out of the employment. The affirmative of the proposition was held in each case, especially where such injury or death results from some definite occurrence, as the turning of the nut with a wrench in the Hughes case. Two members of the court, however, dissented in the Hughes case.

There are certain cases which on first view seem to be in conflict with the cases above discussed, among them *O'Hara v. Hayes* (1910), 3 B. W. C. C. 586, decided by the Court of Appeal of Ireland; *Black v. New Zealand Shipping Co.* (1913), 6 B. W. C. C. 720, decided by the Court of Appeal of England; *Kerr v. Ritchies* (1913), 50 S. L. R. 434, 6 B. W. C. C. 419, decided by the Court of Sessions of Scotland.

In the O'Hara case a workman, who had been suffering for some years from progressive heart disease, died while hurrying to a railway station with a parcel for his employer. The decision is indicated by the following: "The county court judge has found that there was no evidence of accident, and we are satisfied that he was right."

In the Black case, a ship officer worked vigorously for several days in superintending the loading of a ship. Six days later, while standing on the bridge of the ship, he suddenly died, there being medical

evidence that death was due to heart failure following the continuous strain of overwork. The trial court found that there was no evidence of an accident. This finding was affirmed on appeal.

It will be observed in each of the foregoing cases the finding below was against the applicant, by the court which primarily determines the facts.

In the Kerr case a workman apparently in good health died suddenly from heart failure while at work lifting baskets filled with corn. The court in holding that the facts did not show the existence of an accident distinguished the Clover case, *supra*, in that, in the Clover case there was a definite particular occurrence to which death could be attributed and was attributed, namely, the bursting of an aneurism just after the effort required in turning the wrench, while in the Kerr case the evidence failed to disclose anything in the nature of a definite particular occurrence.

It may be remarked here, as we said in substance in *Inland Steel Co. v. Lambert* (1917), 66 Ind. App. 246, 118 N. E. 162, that since the language of our act by which the right to compensation is limited, namely, "injury by accident arising out of and in the course of the employment" was taken literally, if remotely, from the English Workmen's Compensation Act, decisions of English courts of last resort prior to the enactment of our act, and construing such language as found in the English act, are at least very persuasive of what construction should be placed on such language as found in our act.

In an interesting article in the 25 Harvard Law Review, p. 328 *et seq.*, the author develops from the decided cases that the term "by accident" has been

consistently construed to include two different ideas—that of unexpectedness, and that of injury sustained on some definite occasion. Developing also that the English cases are steadily drifting towards a spirit of increased liberality in favor of the injured workman, he says, at page 340: "Since the case of *Fenton v. Thorley* (*supra*) nothing more is required than that the harm that the plaintiff has sustained shall be unexpected. It is no longer required that the causes external to the plaintiff himself, which contribute to bring about the injury, shall be in any way unusual; it is enough that the causes, themselves known and usual, should produce a result which on a particular occasion is neither designed nor expected. The test as to whether an injury is unexpected and so if received on a single occasion occurs 'by accident' is that the sufferer did not intend or expect that injury would on that particular occasion result from what he was doing. What was actually probable or even inevitable because of circumstances unknown to the sufferer is even more unimportant. The test is purely subjective to the injured workman." The author cites among other cases, *Clover, etc., Co. v. Hughes, supra*.

We proceed to a brief consideration of the American cases.

In *Grove v. Michigan Paper Co.* (1915), 184 Mich. 449, 151 N. W. 554, a workman with a physical ailment, due to a previous injury, suffered a rupture of the femoral artery, while lifting sacks filled with alum. He was at the time doing his usual work in the usual way, except that until two days previously to the injury he was assisted by another man. The award of the board allowing him compensation was affirmed.

Indian Creek Coal, etc., Co. v. Calvert—68 Ind. App. 474.

To the same effect is *Bayne v. Riverside Storage, etc., Co.* (1914), 181 Mich. 378, 148 N. W. 412, where a workman contracted pneumonia following a heavy lift.

In *LaVeck v. Parke, Davis & Co.* (1916), 190 Mich. 604, 157 N. W. 72, L. R. A. 1916D 1277, a workman suffering from arterio sclerosis suffered a rupture of a blood vessel of the brain after a protracted period of ordinary work in circumstances where he was subjected to great heat. The Industrial Board held that he suffered an injury by accident arising out of the employment. The court on appeal, following and quoting from the Fenton and Hughes cases, *supra*, among others, affirmed the award. In the course of the opinion, the court construed the Bayne case, *supra*, saying: "In that case Mr. Bayne undoubtedly intended to do the lifting which he did, but he did not expect the effect would be to hurt his back, with resulting pneumonia. In the instant case Mr. LaVeck intended to do the prolonged work which the situation demanded, but he did not anticipate that because of doing so his blood pressure would be so increased as to result in the rupture of a cerebral blood vessel. * * * It was an unexpected consequence from the continued work in the excessively warm room." It will be observed that compensation was allowed in the LaVeck case, although the injury sustained could not be assigned to any definite occasion, or to any specific event, the injury resulting rather from prolonged labor, with no change in the circumstances or surroundings.

See, also, *Robbins v. Original Gas Engine Co.*, *supra*, where a workman was ruptured in an effort to lift a heavy engine; also *Bell v. Hayes, etc., Co.*

(1916), 192 Mich. 90, 158 N. W. 179, where a workman suffered a rupture in endeavoring to lower a window which required considerable exertion; *Hurley v. Selden, etc., Construction Co.* (1916), 193 Mich. 197, 159 N. W. 311, where a workman suffered a like injury in lifting certain terra cotta window sills; *Bystrom Bros. v. Jacobson* (1916), 162 Wis. 180, 155 N. W. 919, L. R. A. 1916D 966, where a workman suffered a muscular strain in lifting cement blocks, the court citing, among others, *Fenton v. J. Thorley & Co.* and *Clover, etc., Co. v. Hughes, supra*; and *Schroetke v. Jackson, etc., Co.* (1916), 193 Mich. 616, 160 N. W. 383, L. R. A. 1917D 64, where a watchman's death was caused by heart failure induced by exertion and excitement growing out of the performance of his duty in giving an alarm of fire, the court citing and reviewing many of the English and American cases discussed in this opinion, and citing also and distinguishing the O'Hara, the Kerr and the Black cases discussed above. Also *Zappala v. Industrial Ins. Comm.* (1914), 82 Wash. 314, 144 Pac. 54, L. R. A. 1916A 295.

It will be observed that in some of the cases reviewed above, the accident is regarded as the physical break or the like in the body resulting from some occurrence or event, or course of events, rather than any such occurrence or event; while the injury is regarded as the physiological consequence of such break or the like rather than the latter. Thus, in *Clover, etc., Co. v. Hughes, supra*, a case involving the rupture of an aneurism, Lord MacNaghten, in illustrating that the workman suffered an accident, quoted from *Brintons v. Turvey* (1905), L. R. A. C. 230, to the effect that "the man broke part of his

Indian Creek Coal, etc., Co. v. Calvert—88 Ind. App. 474.

body.” Likewise, in *Fenton v. J. Thorley & Co.*, *supra*, a case wherein a workman was ruptured, Lord Robertson, in arguing that the man met with an accident, illustrated his position by supposing that the wheel had broken, and said in substance that such an occurrence would have plainly been an accident, likewise the rupture.

This court seems to be committed to the doctrine that a personal injury, as that term is used in the Workmen’s Compensation Act, has reference

6. not to some break in some part of the body or some wound thereon, or the like, but rather to the consequence or disability that results therefrom. See *In re McCaskey* (1917), 65 Ind. App. 349, 117 N. E. 268, and cases.

After this somewhat extensive examination of the cases decided under statutes identical or practically identical to ours, we conclude that, even under

4. the rule which requires that a definite occurrence must be identified in order that a certain injury may be said to be accidental, the injury here was by accident arising out of the employment.

The award is affirmed, with five per cent. damages as provided by §3 of the amendment of 1917 (Acts 1917 p. 154, §8020s2 Burns’ Supp. 1918).

Ibach, C. J., Batman, P. J., and Felt and Hottel, JJ., concur.

Dausman, J., dissents.

ON PETITION FOR REHEARING.

CALDWELL, C. J.—It is earnestly insisted by appellant in support of its petition for a rehearing that, in arriving at the conclusion indicated by the

7. prevailing opinion, we violated the rule that, in the process of establishing the truth of a

proposition by evidence, probative force may not be assigned to an inference deduced from some other inference. There is a rule to that effect. It, however, is frequently misinterpreted and misapplied. For the purpose of supporting a proposition, it is not permissible to draw an inference from a deduction which is itself purely speculative and unsupported by an established fact. Where an inference not supported by or drawn from a proved or known fact is indulged, and is then used as a basis for another inference, neither inference has probative value. Such a process may be described as drawing an inference from an inference, and is not allowable. At the beginning of every line of legitimate inferences there must be a fact, known or proved. *Cleveland, etc., R. Co. v. Starks* (1915), 58 Ind. App. 341, 106 N. E. 646. Where there is such a fact, the proper tribunal is not only permitted, but also it is its duty, to draw therefrom those legitimate inferences that seem to be most reasonable. An inference so drawn becomes a fact in so far as concerns its relation to the proposition to be proved. It merges itself into the proved fact from which it was deduced, and the resulting augmented fact becomes a basis for other proper inferences. To assign to an inference properly drawn a position inferior to an established fact would in effect nullify its probative force. The following we believe to be a sound discussion of the rule: "It was once suggested that an 'inference upon an inference' will not be permitted, i. e. that a fact desired to be used circumstantially must itself be established by testimonial evidence; that this suggestion has been repeated by a few Courts, and sometimes actually enforced. There is no such rule; nor

can be. If there were, hardly a single trial could be adequately prosecuted. For example, on a charge of murder, the defendant's gun is found discharged; from this we infer that he discharged it, and from this we infer that it was his bullet which struck and killed the deceased. Or, the defendant is shown to have been sharpening a knife; from this we argue that he had a design to use it upon the deceased; and from this we argue that the fatal stab was the result of this design. In these and innumerable daily instances we build up inference upon inference, and yet no Court ever thought of forbidding it. All departments of reasoning, all scientific work, every day's life and every day's trials, proceed upon such data. The judicial utterances that sanction the fallacious and impracticable limitation, originally put forward without authority, must be taken as valid only for the particular evidentiary facts therein ruled upon." 1 Wigmore, Ev. §41.

A careful reading of the prevailing opinion will disclose that we have not violated the rule. Petition overruled.

DISSENTING OPINION.

DAUSMAN, J.—I am unable to concur in the majority opinion, and I regard the case at bar of such importance as to justify me in stating my reasons for dissenting.

What the word "accident" means, as used in the statute, is a question for the court. On this point there is no controversy. It is universally conceded that the word is to be taken in its ordinary and popular sense. Whether Addison Calvert came to his death by accident or by disease is purely a question

of fact; and this is the first question to be determined. Under the familiar rule of appellate procedure, if the finding of the board is a legitimate conclusion from the evidence, we must sustain the award, even though the contrary conclusion would be equally legitimate. But, if the finding is not a legitimate conclusion, then it is our duty fearlessly to reverse.

Since the majority opinion is so far-reaching in its consequences, it seems to me that a compact statement of all the evidence would be a source of satisfaction to those who are directly interested in the administration of the Workmen's Compensation Act. Therefore I will set out the substance of all the evidence, which is as follows:

George Calvert testified:

"I am a son of Addison Calvert. I am 25 years of age. On January 3, 1917, I was working with my father loading coal. We went to work at seven o'clock that morning. My father was as strong as common. There was nothing wrong with him that I knew of. He was not complaining any. His health before that had been good. He had worked about every day that the mine run. He was a blacksmith and did repair work on lawn mowers and jobs like that. About 9 o'clock that morning we had half a car but could not push it. After we had pushed on the car he said 'My side hurts.' We got Mr. Snap and his son to help us push it around to the room where we could finish loading. We pushed the car up over a kind of slope until it got to going down hill and then we took it the rest of the way ourselves into our other room. We started to finish loading and while we were working he was on

one side of the car and I was on the other. I heard him holler 'Oh.' He was leaning against the car holding his side. I asked him what was the matter and he said 'I don't know.' He kept saying 'Oh, my side.' He had his hand on his left side. He said 'Take me over to the other side of the car and lay me down.' He leaned against me and I helped him around the corner of the car and laid him down on a slack pile. He wanted a drink of water and I got my bucket and gave him the water but he said he couldn't drink. I went back and got Mr. Snap and Bill to come up there and I left them with father while I went to the bottom to get some other people. We took him out of the mine to the office where the bookkeeper and timekeeper and Mr. Adams (the mine boss) were. We laid him on a cot, then called a doctor. I stayed with him until he died. It was about 10:45 when he died. His body was taken to the undertaker's, and then to our home where Dr. Carson, Dr. Funk and another person held an autopsy. My father was addicted a good bit to the use of liquor. The coal we were loading was tolerably small lumps and father was shoveling at the time he cried out. He had lifted a chunk right on the corner. The coal was about like common. The lumps were about as big as they generally are. The work he was doing there was what we had been doing night and day at the mine. The amount he was lifting on that lump of coal when he cried out was just the ordinary way of loading coal and the ordinary load that he lifted. It would weigh maybe 35 or 40 pounds. Sometimes

a fellow lifts as much as 75 or 100 pounds. He was using the big flat scoop shovel which when filled with coal would weigh 25 pounds. He was doing what he had been doing day in and day out as long as he worked in the mine, and nothing extra. Mr. Adams talked to me right after we came up on top. I think I told him then that father was lifting a lump of coal that weighed about 15 pounds. It was a rough guess. I think I told him about us pushing the car, but I don't know whether I did or not."

Thornton Snap testified:

"On the morning of January 3, 1917, when we went into our working place Addison Calvert and his son were in their place, just a room between us. His son came after us to help them push a car. We helped them push it out of No. 11 to No. 12. After we got it to a point where it is a little down grade, they took it on and we went back. I do not believe we threw a half dozen shovels in our car until his son came and called us. We went to their room and found his father lying down on some slack, holding his hand over his heart. His son went after some other help. We put him on a stretcher. I gave him some water and we took him out on top. He was unable to drink the water. I noticed nothing wrong with him before I saw him lying down there. When we were pushing the car he was talking the same as he always had. He was cutting up and was all right as far as I know anything about it. As far as I could tell, he was a strong, hearty looking man, except that when we pushed the car on the switch he said 'Oh, my side.' But he just

Indian Creek Coal, etc., Co. v. Calvert—68 Ind. App. 474.

went on and he never said anything more. We went back to our working place. I didn't see him loading the car and don't know what happened after we left until we were called again. We took him to the coal company office. He lived about three-quarters of an hour after that. I was present when the doctors held the autopsy on him."

Laura Calvert testified:

"From the time we were married my husband was in good health. He did lots of hard work. He might have taken a little medicine sometimes, but I do not remember of his ever having a doctor. He worked all he had a chance to work. I knew he drank. He would get kind of 'shot to pieces' and I would straighten him out and he would go back to work. It would take him two or three days to straighten up when he had these spells. He said sometimes his side hurt him. He would cough and say his side hurt him. When he was not working at the mine he worked at the blacksmithing shop or on the section."

Steve Adams testified:

"I am mine boss at the Indian Creek mine. I asked George Calvert after he had his father up in the office what happened. He said: 'We were loading a car—not very big chunks. He was lifting a chunk of coal to put on the car when he hollered.' After talking to George I went down and looked at the condition in the room and in the car. I found no big chunks. The shot of coal they were loading was broken up pretty well. The biggest chunk would weight about ten or fifteen pounds."

Dr. S. O. Carson testified:

“I am a practicing physician and surgeon. I am coroner of Knox county. As coroner I was called to view the body of Addison Calvert on the 3rd day of January, 1917. I went to his home in Vincennes and had an autopsy performed by Dr. Funk. I prepared the report of the autopsy which Dr. Funk signed. I observed what took place while the autopsy was being held. The aorta was ruptured. I found a diseased condition of the aorta and of the larger blood vessels around the aorta, which I think was the cause of the rupture. The aorta was very thin at the point of the rupture and broke through because of the thinness. This condition of the blood vessels had probably been existing for quite a while, but the rupture was instantaneous. Where we have a thinning process of the blood vessels brought about by disease, exertion or strain might cause a rupture; and sometimes in bad cases there is a rupture when a person is asleep, without any strain. The blood vessels around the heart were all more or less in a diseased condition, but there was a rupture at one point only. Such a rupture comes at the weakest part and sometimes without any exertion. The condition of his heart seemed to be normal but the walls of the blood vessels were thinner than normal. From the appearance of the wall and the condition we found there, it looked as though it might have been caused by strain or exertion of some kind.”

Dr. V. A. Funk's written report of the autopsy:

“I performed an autopsy on Addison Calvert

Indian Creek Coal, etc., Co. v. Calvert—68 Ind. App. 474.

Jan. 3rd, 1917, at which autopsy the following was noted:—

“The heart seemed to be normal. Also the arch of the aorta. About one and one-half or two inches below the arch in the wall of the descending aorta there was a thinning out of the wall of the aorta around where the perforation occurred, the walls at the site of the perforation being very thin, the perforation occurring at the right side of the vessel, the hemorrhage occurring back of the pleura and pushing the right pleura and lung forward, filling up the right pleural cavity.

“The cause of a perforation at this site where the vessel was thinned out beforehand, as this was, could be from several different reasons:— A chronic alcoholic might develop a weakening of the aorta at any position, causing a thinning of the wall and finally a rupture. It might also be due to syphilis, and might also be due to a tubercular focus in one or more of the mediastinal glands lying next to the arterial wall, causing a weakening and therefore a thinning and stretching at that point, which if the tubercular focus continues, sooner or later a perforation with fatal hemorrhages will occur. After the wall is thinned and weakened by whatever cause, the perforation might take place at any time. A sudden jar might cause it to rupture. Running across the street, or for a street car; or taking a few quick steps to get out of the way of some danger as from an approaching automobile, etc.; or any excitement whatever which would make the heart beat more rapidly for a few beats; or

ordinary labor; or any exercise whatever, which causes an increase in pulse beats, thereby raising the blood pressure of the aorta, would render that weakened place subject to rupture at any time. As the thinning goes on it might rupture during the patient's sleep or give way while sitting still or with a fit of coughing or laughing.

"One of the miners that night spoke of Mr. Calvert having complained of pain in the chest at this region two or three days before his death. This pain is in keeping with this condition, because as the condition progresses the patient would naturally have pain. Taking everything into consideration, there is no way of ascertaining how long this thinning process had been going on before the rupture occurred. It might have been several days or it might have been several weeks. No one could say as to the time that it had been progressing. Usually, however, these conditions arise slowly, and it is most probable that the thinning out of this vessel wall had been going on for several weeks.

"Considering everything, I believe that this condition in the beginning was a tubercular infection of a mediastinal gland which, due to its close proximity to the vessel wall, eroded the wall and caused a thinning out at that location.

"V. A. Funk."

In addition to the testimony of Dr. Carson, as above stated, he was asked the following question: "Now, you may state to the court, upon the performing of this autopsy, what caused the death of Addison E. Calvert?" He answered: "I see here from my records—it shows accidental rupture of the descend-

ing aorta, which caused his death." Obviously, this answer cannot be considered for any purpose. It is a mere statement of his conclusion as to what is shown by the record or report of the autopsy. That report is in evidence and speaks for itself. Having disregarded this question and answer, I find that there is not the slightest conflict in the evidence.

1. When considering what this evidence tends to prove, the mind naturally rests on the statement of Dr. Funk. When he said, "Considering everything, I believe that this condition in the beginning was a tubercular infection," etc., he was stating his matured opinion, his deliberate judgment, his conviction, in the light of his learning, skill and experience as a physician and surgeon. His words can have for us no other meaning. As to the cause of the erosion of the wall of the artery, he could testify in no other way. The same observation is applicable to this statement of Dr. Carson: "I found a diseased condition of the aorta and of the larger blood vessels around the aorta, which I think was the cause of the rupture." We are bound to give to the statements of these doctors full faith and credence. They were in a situation to know the truth as to the man's physical condition and the results that must necessarily flow from that condition. There is nothing in the testimony of the other witnesses which conflicts with their statements or which detracts therefrom in the slightest degree. Their testimony must be regarded as conclusive as to the facts concerning which they have testified.

We have the facts, then, that for a considerable time the man had been afflicted with a disease which had eaten into the wall of the descending aorta at a place near the heart. The wall there was so thin that

a rupture must inevitably result. From this cause alone, death was imminent. The final excitant might have been the act of coughing or laughing, a sudden jar, a few quick steps, running across the street, ordinary labor, or any exercise whatever. The rupture of the artery would have occurred as the disease progressed without any excitant at all, and might have taken place while seated quietly in a chair or while asleep. If the rupture had occurred in his home when he was laughing or coughing, would anyone contend that he came to his death by accident? The fact that he happened to be working when the rupture occurred, does not alter the case a particle. He was doing his normal work. There was nothing unusual, extraordinary or fortuitous in the events of that morning. He was liable to die at any moment; and the most that can be said is that the fatal moment came when the unfortunate man was working. Manual labor of every kind requires more or less muscular exertion, involving accelerated and intensified heart action. Naturally, therefore, when a man is working, his arteries are subjected to a greater strain than when his body is in a state of repose. This is a simple and well-known physiological truth. But when a man is doing his usual work in the usual way the arterial strain resulting therefrom must be regarded as normal. While the deceased was shoveling coal in the usual way, and while his muscular activity was accompanied by the natural and normal blood pressure, the aorta burst because it had been thinned and weakened by disease. There is a direct causal connection between the disease and the death, and that fact excludes the idea of death by accident. How can it be said with the slightest semblance of verity that

the bursting of the aorta was the result of an accident? Who, by the most careful and persistent search, can find the accident that caused the death? I am compelled to the conclusion that the deceased came to his death by disease, and not by accident, and that no other legitimate conclusion can be deduced from the evidence. Compare the case at bar with the following: *O'Hara v. Hayes* (1910), 3 B. W. C. C. 586; *Kerr v. Ritchies* (1913), 6 B. W. C. C. 419; *Black v. New Zealand Shipping Co.* (1913), 6 B. W. C. C. 720 (cited in *Schroetke v. Jackson, etc., Co.* [1916], 193 Mich. 616, 160 N. W. 383, L. R. A. 1917D 64).

It seems that this is the conclusion to which the mind naturally would come were it not for the fact that apparently a different conclusion has been reached in certain analogous cases. Now, to what extent, if at all, should we be influenced by other cases, whether in seeming harmony or in seeming conflict with the finding in the case at bar? A full and thorough discussion of this question would be interesting and generally helpful; but I will not extend this statement by attempting it. I will content myself by saying that the rule of *stare decisis* is wholly inapplicable. That rule is applicable only where a principle of law is involved. 7 R. C. L. 1000; 11 Cyc 745; 15 C. J. 916 *et seq.* As a necessary corollary to the rule of *stare decisis* the courts have long recognized the beneficent principle that when dealing with evidence the human mind should not be fettered by so-called precedents. When searching evidence it is essential that the minds of judges and jurors should be free, in order that they may find the truth. This principle is so universally recognized that it is seldom

Indian Creek Coal, etc., Co. v. Calvert—68 Ind. App. 474.

thought necessary to express it. *Kitchenham v. S. S. "Johannesburg"* (1911), 4 B. W. C. C. 311; *S. S. "Swansea Vale" v. Rice* (1911), 4 B. W. C. C. 298. In very truth, for such duties there are no precedents; for it never happens that the evidence, the situation of the parties, and the subtle psychical influences operating on the triers of fact, are identical. 15 C. J. 919. The most that can be said is that some cases are merely analagous. Reasoning by analogy is the weakest form of reasoning and is inherently dangerous. Under our system of jurisprudence the idea that we can be bound by precedent in deciding questions of fact is more than impracticable—it is impossible. What matter, then, how or when or where certain courts, boards, commissions or other bodies have decided a question of fact which on appeal was sustained on the ground that there was "some evidence" to support it? On what principle can it be said that a previous decision of a question of fact is either controlling or persuasive? Such cases are useful only for the purpose of comparison.

An analysis of the majority opinion discloses that it does not determine the question *as a question of fact*, but rather *as a question of law* by putting upon the word "accident" a strange and extraordinary meaning. By enacting the Workmen's Compensation Law the legislature provided a species of workmen's *accident* insurance; but the effect of the majority opinion is to extend the law by judicial construction to include also *life* insurance. If the legislature had intended that the statute should include cases like the one at bar, surely it would not have been so improvident as not to have provided some equitable basis on which the feature of life insurance could stand. If

Newcastle Foundry Co. v. Lysher—68 Ind. App. 509.

the plan evidenced by the majority opinion is to be adopted, it will result in awarding compensation in every case of death by heart failure, apoplexy, or other disease of any kind whatsoever, on the mere statement that the death *might* have been accelerated by the normal "strain and exertion" of the deceased's usual work; for that "strain and exertion" always exists. To bring about such a result by judicial construction is a palpable invasion of the province of the legislature.

2. Furthermore, I am of the opinion that Addison Calvert's death did not arise out of his employment; that such a death could not reasonably be said to have been within the contemplation of his employer at the time of entering into the contract of service; that it was not due to any external hazard which he was required to encounter in his working place, but was due to a fatal disease which lurked within him; that there is no causal relation between his death and his employment; and that his death was in no manner an incident of the service.

NOTE.—Reported in 119 N. E. 519, 525, 120 N. E. 709. Workmen's compensation: what is an "accident" or "personal injury" within the meaning of the act, L. R. A. 1916A 40, L. R. A. 1917D 114.

NEWCASTLE FOUNDRY COMPANY V. LYSHER.

[No. 9,768. Filed November 21, 1918.]

1. MASTER AND SERVANT.—*Workmen's Compensation Act.—Proceedings for Award.—Burden of Proof.*—One claiming compensation under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, has the burden of proving that the injuries complained of resulted from an accident arising out of and in the course of the employment. p. 512.

Newcastle Foundry Co. v. Lysher—68 Ind. App. 509.

2. **MASTER AND SERVANT.—Workmen's Compensation Act.—Injury Arising Out of and in Course of Employment.**—In a proceedings for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, the fact that the injury complained of resulted from an accident arising out of and in the course of the employment may be shown by direct proof, or may be proved by facts and circumstances which reasonably authorize the Industrial Board to infer that the injury was so received. p. 512.
3. **MASTER AND SERVANT.—Workmen's Compensation Act.—Injuries to Servant.—Award.—Evidence.—Sufficiency.**—In a proceedings for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, evidence held sufficient to sustain the finding that the injury complained of resulted from an accident arising out of and in the course of the employment. p. 513.

From the Industrial Board of Indiana.

Proceedings under the Workmen's Compensation Act for compensation by Charles Lysher against the Newcastle Foundry Company. From an award for applicant, the defendant appeals. *Affirmed.*

Solon J. Carter, D. P. Williams and Taylor, Carter & Wright, for appellant.

W. R. Meyers and C. M. DeWitt, for appellee.

FELT, P. J.—This is an appeal from an award made by the full Industrial Board of Indiana. The record did not reach the court until October 29, 1918.

Appellant moved for a new trial, but in its reply brief abandons any alleged error based thereon, because of the holding of this court that a motion for a new trial is not necessary or proper under the Indiana Workmen's Compensation Act. *Union Sanitary Mfg. Co. v. Davis* (1917), 63 Ind. App. 548, 114 N. E. 872.

Appellant had made numerous assignments of alleged error, but the assignments that the decision

Newcastle Foundry Co. v. Lysher—68 Ind. App. 509.

of the Industrial Board is not sustained by sufficient evidence and is contrary to law present the only questions available to appellant, and others need not be considered. *Bimel Spoke, etc., Co. v. Loper* (1917), 65 Ind. App. 479, 117 N. E. 527, 529.

The full Industrial Board made a finding of facts and an award as follows: "And the full board having heard the argument of counsel for the defendant and having reviewed the evidence and being duly advised in the premises, finds that on the 19th day of February, 1916, plaintiff was in the employment of the defendant at an average weekly wage of \$10.75; that on said date plaintiff received a personal injury by an accident arising out of and in the course of the employment, resulting in a seventy-five per cent. permanent impairment of the sight of his right eye with glasses; that on the 28th day of February, 1916, the plaintiff served upon the defendant written notice of his injury; that the defendant had been personally notified of said injury on the 23rd day of February, 1916, and that the defendant provided the plaintiff with an attending physician during the first thirty days after his injury; that notwithstanding the fact that the defendant had personal notice and was served with written notice on the plaintiff's injury, and provided him an attending physician, said defendant has wholly failed to file any accident report herein.

"Award.

"It is therefore considered and ordered by the full Industrial Board that the plaintiff be and is hereby awarded, against the defendant, seventy-five weeks' compensation at the rate of \$5.91 per week, beginning on the 5th day of March, 1916. Dated this 2nd day of September, 1916."

Appellant states that: "There is but one big issue in this case and that is whether or not there rested upon appellee the burden of proving at the hearing that he suffered an accidental injury arising out of and in the course of his employment which resulted in the loss of nine-tenths of the sight of his eye, and if there existed such a burden, was it discharged by appellee?"

The burden is placed upon the one claiming compensation under the act in question to prove that the injuries complained of resulted from an acci-

1. dent arising out of and in the course of the employment of such person. *Union Sanitary Mfg. Co. v. Davis* (1917), 64 Ind. App. 227, 115 N. E. 676; *Haskell, etc., Car Co. v. Brown* (1918), 67 Ind. App. 178, 117 N. E. 555; *Bucyrus Co. v. Townsend* (1917), 65 Ind. App. 687, 117 N. E. 656.

That the injury in any particular case resulted from an accident arising out of and in the course of the employment of the injured employe may be

2. shown by direct proof, or may be proved by facts and circumstances which reasonably authorize the board to infer therefrom that the injury complained of was so received. *Cleveland, etc., R. Co. v. Starks* (1915), 58 Ind. App. 341, 355, 361, 106 N. E. 646; *Haskell, etc., Car Co. v. Brown, supra*; *Ropp v. Fulton* (1915), 183 Ind. 251, 263, 108 N. E. 946; *Bimel Spoke, etc., Co. v. Loper, supra*.

There is no dispute in this case about the fact that appellee was employed by appellant, and that he suffered an injury to his right eye from some cause. Appellant asserts, however, that there is a total failure of proof tending to show that the condition of appellee's eye was due to an accident, and also that,

if it be shown that the condition of the eye was due to an accident, the proof wholly fails to show that the accident arose out of or in the course of his employment by appellant.

There is evidence tending to prove that appellee was employed by appellant, and that he worked at unloading cars and chipping and cleaning

3. metal castings; that on or about February 19, 1916, while working in the foundry, in the dust, some hard substance entered his eye; that he continued to work; that the eye pained him some in the afternoon of that day, became inflamed, and was observed and commented upon by persons whom he met on that evening and on the following day; that on February 20 he consulted Dr. E. S. Ferris, an eye specialist, who was employed by appellant in appellee's case; that Dr. Ferris removed a hard substance from the anterior surface of the cornea of appellee's right eye; that the eye was inflamed at that time and subsequently became infected, and he lost vision until it was only one-tenth of normal strength.

Dr. Ferris testified that his records show that he removed the substance from appellee's eye on February 24 and did not recall seeing him prior to that date, though he could not always rely on the fact that his entries were made on the day the service was rendered which occasioned the entry. He also testified that he carefully sterilized the instruments he used in operating on appellee's eye; that the lining of the lid of the eye invariably carries various bacteria and the eye is very susceptible to infection; that sometimes all that is necessary is a very little break in the delicate membranes of the eye to produce

an infection; that in this case the infection resulted in a sluffing ulcer that finally involved all of the layers of the cornea; that the infection reached the anterior chamber and there was pus formed in that chamber; that the condition of appellee's eye when he first saw it would not have suggested such an infection, but it depends largely on the resistance in the individual; that there was no infection in appellee's eye when he removed the hard substance from it, but the infection developed subsequently during the first week following the operation.

Appellee testified that his eye was hurt at the foundry on Saturday, because his eyes were clear in the morning and pained him in the evening and on the day following; that he spoke to Mr. Davis, the foreman, and the company furnished him groceries of the value of \$34, and money to the amount of \$8, while he was suffering from the injury.

The evidence also shows that on February 28, 1918, appellee notified appellant in writing that, while in appellant's employment on February 19, 1916, his eye was injured by a chip from a casting flying into his right eye while he was at work chipping and cleaning iron castings. There was also other evidence tending to prove that appellee's eye pained him and was badly inflamed shortly after he got the substance in it at the foundry, and that he saw the doctor very soon afterwards. There was also evidence tending to prove that appellee drank intoxicating liquor while he was taking treatment for his eye; that he had taken the Keely cure, and that he had been sentenced to serve a term in jail for public intoxication; that a person who uses intoxicating liquor has less resistance to disease and is more liable

Hammerton v. J. R. Watkins Medical Co.—68 Ind. App. 515.

to infection than persons who are free from the effects of intoxicating liquors.

The full Industrial Board made a finding which authorizes the award made to appellee.

The evidence and the inferences that may fairly and reasonably be drawn therefrom sustain the findings without resorting to inferences drawn from other inferential facts. *United Paperboard Co. v. Lewis* (1917), 65 Ind. App. 356, 117 N. E. 276; *In re Bowers* (1917), 65 Ind. App. 128, 116 N. E. 842; *Indianapolis Abattoir Co. v. Coleman* (1917), 65 Ind. App. 369, 117 N. E. 502; *Cleveland, etc., R. Co. v. Starks, supra*.

The award of the full board is affirmed.

NOTE.—Reported in 120 N. E. 713.

HAMMERTON ET AL. v. J. R. WATKINS MEDICAL COMPANY
ET AL.

[No. 9,583. Filed November 21, 1918.]

1. PLEADING.—*Demurrer.—Form.—Sufficiency.*—A demurrer is sufficient in form and substance where it is in the statutory language and the memorandum points out specifically the defects in the paragraph to which it is addressed. p. 517.
2. APPEAL.—*Review.—Ruling on Demurrer.—Scope of Review.*—It is only where the demurrer is overruled that the form and substance of the demurrer and memorandum are controlling on appeal. p. 517.
3. APPEAL.—*Questions Reviewable.—Record.*—On an appeal from a judgment on a note given in settlement of money due under a contract, a ruling sustaining a demurrer to an answer averring that plaintiffs failed to fulfill certain stipulations in the contract cannot be determined where the contract is not in the record. p. 518.
4. COMPROMISE AND SETTLEMENT.—*Note Given in Settlement of Claims.—Presumption.*—Where a note was given in settlement of

Hammerton v. J. R. Watkins Medical Co.—68 Ind. App. 515.

claims arising out of a contract, it must be presumed, in the absence of a showing to the contrary, that all controversies relating to such contract were thereby extinguished. p. 518.

From Jasper Circuit Court; *Charles W. Hanley*, Judge.

Action by the J. R. Watkins Medical Company and others against George H. Hammerton and others. From a judgment for plaintiffs, the defendants appeal. *Affirmed.*

John A. Dunlap, for appellants.

James H. Chapman and *Tawney, Smith & Tawney*, for appellees.

DAUSMAN, J.—This action was instituted by the J. R. Watkins Medical Company against Ed Longstreth, George H. Hammerton and Joseph Kosta on a promissory note. Hammerton and Kosta answered in three paragraphs and filed a cross-complaint, alleging that they executed the note as sureties for Longstreth. Demurrers to second and third paragraphs of answer sustained. By agreement, trial without a jury. Judgment for plaintiff. The errors assigned challenge the ruling on the demurrers.

The following is the substance of the second and third paragraphs of answer: "Longstreth entered into a contract with the Medical Company by the terms of which the Company agreed to sell him merchandise on credit; bills were to be rendered him on the first of each month for merchandise sold during the preceding month, and bills were to become due and payable every thirty days on presentation. Hammerton and Kosta executed the contract as guarantors for Longstreth, and were to become liable only in the event that Longstreth failed to make his pay-

Hammerton v. J. R. Watkins Medical Co.—68 Ind. App. 515.

ments under the contract. The merchandise purchased by Longstreth in the first month amounted to fifty dollars, for which he failed to pay. The company failed to notify the guarantors of his failure to pay, but continued to sell him merchandise under the contract for a period of more than eighteen months; and he continued regularly to make default in payment. Finally the note was executed in settlement of the entire amount due on the contract.

“At the time of the execution of the note the company fraudulently concealed from Hammerton and Kosta the fact that it had failed to make any effort to collect from Longstreth. The company also failed to notify them from month to month of the default of their principal, and they executed the note believing that proper efforts had been made by the company to collect from him. At the time of making default in the payment of each monthly account Longstreth was solvent. He is now insolvent.”

Appellants present three contentions only: (1) That each demurrer and the memorandum thereto attached is not sufficient in form and substance; (2) that the failure of the company to inform them from month to month of the condition of their principal's account released them from their obligation as guarantors in the original contract; and (3) that they are entitled to make that defense against the note.

The first contention cannot be sustained. Each demurrer is in the statutory language, and each memorandum points out specifically the defects in the paragraph to which it is addressed.

1. Moreoveer, it should be remembered that it is only in cases where the demurrer is overruled
2. that the form and substance of the demurrer and memorandum are controlling on appeal.

Van Spanje v. Hostettler—68 Ind. App. 518.

Blue v. Capital Nat. Bank (1896), 145 Ind. 518,

3. 43 N. E. 655; *Sonneborn v. S. F. Bowser & Co.* (1917), 64 Ind. App. 429, 116 N. E. 66. The second contention we cannot determine. The entire original contract is not disclosed, and we cannot say what were the rights of appellants thereunder. As to the third, it appears that the note was given
4. in settlement of the claims arising out of the original contract; and it must be presumed, on these answers, that all controversies relating to said original contract were thereby extinguished. It does not sufficiently appear from the answer that in the execution of the note there was any fraud, mutual mistake, or illegality, which would constitute a defense.

The court did not err in sustaining the demurrers. Judgment affirmed.

NOTE.—Reported in 120 N. E. 210.

VAN SPANJE ET AL. v. HOSTETTLER.

[No. 9,551. Filed May 28, 1918. Rehearing denied November 21, 1918.]

1. PLEADING.—*Waiver of Error.—Insufficiency of Complaint.—Failure to Demur.*—Under §348 Burns 1914, Acts 1911 p. 415, §3, providing that, if no objection is made by demurrer or answer, to a defect in the complaint, the objections thereto are waived, failure to demur to a complaint waives the objection that the complaint is insufficient for want of facts. p. 521.
2. APPEAL.—*Presenting Questions for Review.—Ruling on Demurrer.—Assignment of Error.*—The overruling of a demurrer will not be reviewed on appeal where the question is not presented by an assignment of error. p. 522.
3. CONTRACTS.—*Fraud.—Liability.*—Where a person designedly or

knowingly causes a false impression or belief to be entertained by another, and the latter is thereby induced to make a contract injurious to his interests or to perform a valuable service to the one guilty of the deception on the credit of another, such deception constitutes actionable fraud. p. 524.

4. **APPEAL.—Review.—Evidence.—Sufficiency.**—A verdict will not be disturbed on appeal for insufficiency of evidence where there is some evidence to sustain it. p. 524.
5. **LIMITATION OF ACTIONS.—Concealment of Liability.—Effect.**—Where an officer of a corporation fraudulently induced, a contractor to erect a house on his land in the belief that the house was being constructed for the corporation, the concealment of the fact that the house was not built for the corporation postpones the running of the statute of limitations under §302 Burns 1914, §300 R. S. 1881, providing that where a cause of action is concealed from the knowledge of the person entitled thereto, the action may be commenced at any time within the period of limitation after the discovery of the cause of action. pp. 524, 526.
6. **FRAUD.—Action.—Fraudulent Concealment.**—Acts constituting fraudulent concealment may precede, be concurrent with, or subsequent to, the accruing of the cause of action. p. 526.
7. **APPEAL.—Review.—Evidence.**—The jury's finding will not be disturbed on appeal where sustained by some evidence, although such evidence may have been strongly contradicted and not entirely satisfactory. p. 527.
8. **APPEAL.—Review.—Rulings on Instructions.—Exceptions in Gross.—Effect.**—Where the exception to instructions is in gross, available error cannot be predicated on the giving of such instructions unless all were erroneous. p. 527.
9. **TRIAL.—Instructions.—Directing Verdict.**—A request for an instruction directing a verdict for defendants was properly refused where there was some evidence to sustain every material averment of the complaint. p. 528.
10. **APPEAL.—Review.—Refusal of Instructions.**—It is not error to refuse to give requested instructions which are substantially covered by those given. p. 528.
11. **APPEAL.—Review.—Admission of Evidence.—Scope of Review.**—Where error is assigned on the admission of evidence, a ground of objection not stated in the trial court will not be considered on appeal. p. 528.
12. **FRAUD.—Reliance on Representations.—Testimony as to Belief.—Admissibility.**—In an action for fraud, where plaintiff alleged that defendant, an officer of a corporation, caused him to build a house on defendant's property by designedly inducing him to believe that the house was to be constructed for the corporation,

Van Spanje v. Hostettler—68 Ind. App. 518.

testimony by plaintiff as to what he understood from defendant's declarations was admissible, since the false belief induced by such declarations was an essential element of the right of recovery. p. 528.

From LaPorte Circuit Court; *Harry L. Crum-packer*, Judge.

Action by Zacharias T. Hostettler against Adolf Van Spanje and others. From a judgment for plaintiff, the defendants appeal. *Affirmed*.

Theron F. Müller and *H. B. Tuthill*, for appellants.
Cornelius R. Collins and *Jeremiah R. Collins*, for appellee.

BATMAN, J.—This is an action by appellee against appellants for damages, based on an alleged fraud in inducing appellee to construct two dwelling houses on their real estate, on the credit of the Ohlemacher Brick Company. The complaint is in a single paragraph, and alleges in substance that appellants are, and for the past ten years have been, husband and wife, and that the said Adolf Van Spanje acted as the agent of his said wife, Cora Julia Van Spanje, in the transaction hereinafter stated; that in the year 1907 appellants procured appellee to construct two dwelling houses on certain real estate owned by them in Laporte county, Indiana, as tenants by the entireties; that in order to induce appellee to perform certain labor, and furnish certain materials therefor on credit, the said appellants falsely and fraudulently, and with the intent to deceive appellee, represented to him that said labor and material were to be performed for, and furnished to, the Ohlemacher Brick Company; that appellee relied on said representations, and was induced thereby to perform and furnish said labor and materials for the construction

of the dwelling houses on appellants' said real estate, all of the value of \$500, as shown by a bill of particulars made a part of the complaint; that when the representations were made the said brick company had no interest in the real estate, nor in the construction of the dwelling houses, and appellants were not authorized to have said houses constructed for said company; that appellants knew such representations were false at the time they were made, but that appellee did not know such fact, and did not discover the same until June 4, 1913, which was more than five years after the completion of the houses; that appellants concealed their liability to appellee until such date, when he first discovered that appellants had committed a fraud upon him in the manner alleged; that the real estate has been greatly benefited by the construction of the dwelling houses, and that appellant Cora Julia Van Spanje has received the rents therefrom since the erection thereof. Demand for judgment in the sum of \$500.

Appellant filed an answer in four paragraphs, the first being a general denial, the second and third being based on the six-year statute of limitations, and the fourth being a plea of payment. No reply appears of record. The cause was submitted to a jury for trial. A verdict was returned for the sum of \$391.85 on which judgment was rendered. Appellants filed a motion for a new trial, which was overruled, and this action of the court is the sole error assigned and relied on for a reversal.

Appellants in their brief attack the sufficiency of the complaint for want of facts. The record fails to disclose the filing of any demurrer thereto, and

1. therefore all questions as to its sufficiency in that regard are waived. §348 Burns 1914, Acts

Van Spanje v. Hostettler—68 Ind. App. 518.

1911 p. 415, §3; *Pillsbury, etc., Co. v. Walsh*
2. (1915), 60 Ind. App. 76, 110 N. E. 96; *Milhollin*
v. Adams (1918), 66 Ind. App. 376, 115 N. E.
803. However, if a proper demurrer on such ground
had been filed and overruled, such action could not be
reviewed on this appeal, as such question is not pre-
sented by an assignment of error. *Cleveland, etc., R.*
Co. v. True (1913), 53 Ind. App. 156, 100 N. E. 22.

Appellants have assigned among their reasons for
a new trial that the verdict of the jury is not sus-
tained by sufficient evidence, and is contrary to law.
In support of these reasons they rely on two prop-
ositions: (1) That the evidence is not sufficient to
establish the fraud alleged; (2) that the evidence
does not show facts sufficient to avoid the statute of
limitations. As bearing on these questions it should
be noted that the evidence tends to show that at the
times hereinafter mentioned, the Ohlemacher Brick
Company owned a plant and was engaged in making
building brick a few miles from Michigan City, Indi-
ana; that during such time appellant Adolf Van
Spanje was the secretary and treasurer of said com-
pany, and was actively employed in the conduct of its
business; that appellee was a man of advanced years
and of limited education, and had been engaged in
the construction of houses for a number of years; that
in so doing he had purchased brick of said company,
and had a running account with it by reason of such
fact; that prior to the transaction involved in this
case the said Van Spanje, acting on behalf of said
company, had procured appellee to perform certain
repair and construction work on its buildings, and
had been paid therefor in part, by credits given him
by said company on his running account with it;

that in the month of September, 1907, the said Van Spanje called appellee to his home and said to him, "We want to build some houses for our tenants, or houses for our laborers at the factory, and we might build several of them, a few of them or several of them; two anyhow"; that they wanted one for the night watchman and one for the engineer, and would build them on the other side of the road from the brick plant; that thereafter appellee proceeded to construct said houses by the direction of said Van Spanje; that the business connected therewith was usually transacted at the office of said company and apparently in the usual course of its affairs; that said company furnished certain material therefor, and delivered the same on the premises; that appellee purchased certain materials for such construction and had the same charged to said company with the knowledge of said Van Spanje, and a portion was so charged by his direction; that he requested appellee to use all the brick he could from the plant of said company, saying that every thousand that he would take would help them out that much; that at the time appellee was engaged to construct said houses he believed he was contracting with said company therefor; that he proceeded with their construction under such belief, and did not learn the contrary until long after their completion; that said houses were completed in 1908, but by reason of his running account with said company for brick purchased of it he did not urge a settlement at such time; that in the year 1910, about two years after the completion of said houses, appellee attempted to secure a settlement of his account with said company, including the balance due for the construction of such houses;

that he then learned for the first time that said houses were owned by appellants, and not by said company; that prior to such time he did not know that appellants had any interest in the construction of said houses, and believed that said company was the owner thereof.

It is a well-settled rule that, where a person designedly or knowingly causes a false impression or belief to be entertained by another, and the

3. latter is thereby induced to make a contract injurious to his interests, such contracts is so impressed with fraud that the court will grant relief. *Ray v. Baker* (1905), 165 Ind. 74, 74 N. E. 619; *Kemery v. Zeigler* (1912), 176 Ind. 660, 96 N. E. 950; *Paxton-Eckman Chem. Co. v. Mundell* (1916), 62 Ind. App. 45, 112 N. E. 546. The principle involved in such rule applies with equal force where such false impression or belief leads the person so deceived to perform a valuable service for the one guilty of such deception on the credit of another to his damage. The jury heard the evidence, and was authorized to

4. weigh the same, and draw all proper inferences from the facts established thereby. We may not disturb the conclusion reached by it, unless we can say there was no evidence to sustain such verdict. *Beard v. Payne* (1917), 64 Ind. App. 324, 115 N. E. 782, and authorities there cited. Guided by this well-established rule, we cannot sustain appellants' contention that the evidence is not sufficient to sustain the verdict on the question of fraud.

This brings us to a consideration of appellants' proposition, involving the statute of limitations. The record discloses that said Adolf Van Spanje

5. engaged appellee to construct the houses in question in 1907, and that they were completed

in 1908; that all the facts and circumstances on which appellee relies to establish the fraud on which this action is based occurred prior to the completion of such houses. It is thus apparent that this action is barred under the provision of the fourth clause of §294 Burns 1914, §292 R. S. 1881, unless relief is afforded appellee by §302 Burns 1914, §300 R. S. 1881. This latter section reads as follows: "If any person liable to an action shall conceal the fact from the knowledge of the person entitled thereto, the action may be commenced at any time within the period of limitation, after the discovery of the cause of action." In considering the question of concealment it should be borne in mind that this action is based on the alleged fraud of appellants in inducing appellee to construct the houses in question, and not on an alleged contract for such construction, and hence the concealment to be considered must necessarily relate to such fraud. It has been repeatedly held that to constitute concealment of a cause of action, so as to prevent the running of the statute of limitations, some trick or artifice must be employed to prevent inquiry or elude investigation, or to mislead and hinder the party who had the cause of action from obtaining information, by the use of ordinary diligence, that the right of action exists, and that the acts relied on must be of an affirmative character and fraudulent. *Fidelity, etc., Co. v. Jasper Furniture Co.* (1917), 186 Ind. 566, 117 N. E. 258, and authorities there cited. Appellants rely on this rule, and assert that, at most, the evidence shows nothing more than silence on their part, which is not sufficient to establish concealment. *Jackson v. Jackson* (1898), 149 Ind. 238, 47 N. E. 963. This contention might be

plausible if the jury, in determining the question of concealment, had been confined to the evidence of acts, occurring subsequently to the accruing of appellee's cause of action. However, the jury was not so confined, as it is well settled that acts consti-

6. tuting fraudulent concealment may precede, be concurrent with, or subsequent to, the accruing of the cause of action. *Boyd v. Boyd* (1867),

5. 27 Ind. 429; *Dorsey Machine Co. v. McCaffrey* (1894), 139 Ind. 545, 38 N. E. 208, 47 Am. St. 290; *Jackson v. Jackson, supra*; *Whitesell v. Strickler* (1907), 167 Ind. 602, 78 N. E. 845, 119 Am. St. 524; *Norris v. Haggin* (1888), 136 U. S. 386, 10 Sup. Ct. 942, 34 L. Ed. 424. When we consider the evidence in the light of this rule, we are unable to say there was no evidence of concealment. There was evidence of language used by appellant Adolf Van Spanje, at the time he engaged appellee to construct said houses, when considered in the light of his relation to said brick company and their former business transactions, that was well calculated to induce a belief in appellee that he was employed to construct such houses for said company. There was evidence of later acts on the part of said Van Spanje that were well calculated to confirm such belief and deter appellee from making an investigation as to who was liable to him for the construction of such houses, such as directing appellee to have certain material used in such construction charged to said company, and in requesting appellee to take as much of its brick as possible, so as to help them out. From such facts and circumstances the jury may have drawn the inference that the said Adolf Van Spanje designedly induced such false belief on the part of appellee for the fraud-

ulent purpose of causing him to construct said houses for appellants on the credit of said company. There

was some evidence to establish facts from

7. which such an inference might be properly drawn. Under such circumstances we are bound by the determination of the jury in that regard, although such evidence may have been strongly contradicted and not entirely satisfactory. *Thompson v. Beatty* (1909), 171 Ind. 579, 86 N. E. 961; *Warner v. Jennings* (1909), 44 Ind. App. 574, 89 N. E. 908; *Hollingsworth v. Hollingsworth* (1912), 50 Ind. App. 137, 98 N. E. 79; *Monongahela River, etc., Coke Co. v. Walts* (1914), 56 Ind. App. 235, 105 N. E. 160; *Public Utilities Co. v. Cosby* (1915), 60 Ind. App. 252, 110 N. E. 576.

Appellants, in their motion for a new trial, predicate error on the action of the court in giving certain instructions. The only evidence of any excep-

8. tion to the giving of such instructions, taken by appellants, appears in an entry of the court's proceedings in the following language: "And to the giving of said instructions by the court on its own motion, the defendant excepts." Such exception is in gross or to such instructions as a whole. Under such circumstances, available error cannot be predicated on the giving of said instructions, unless all so given and excepted to were erroneous. *Fairbanks v. Warrum* (1914), 56 Ind. App. 337, 104 N. E. 983, 1141, and authorities there cited. It could not be successfully maintained that all of said instructions were erroneous, and hence the rule stated is applicable here.

Appellants also claim that the court erred in failing to give certain instructions tendered by them.

Among such instructions was one directing the

9. jury to return a verdict for appellants. There was no error in refusing to give such instruction as there was some evidence to sustain
10. every material averment of appellee's complaint. An examination of the record discloses that the subject-matter of the remaining instructions, tendered by appellant, in so far as they correctly stated the law, was substantially covered by the instructions given by the court on its own motion. Under such circumstances there was no reversible error committed by the court in refusing to give such instructions. *J. F. Darmody Co. v. Reed* (1916), 60 Ind. App. 662, 111 N. E. 317; *Vandalia R. Co. v. Parker* (1916), 61 Ind. App. 146, 111 N. E. 637.

Appellants assigned a number of alleged errors in the admission and rejection of evidence, but have only presented one for the determination of

11. this court. Such error relates to the ruling of the court in permitting appellee to testify as to what he understood from the declaration of appellant Adolf Van Spanje. The only reason urged in this court against the admission of such evidence is that such fact could not be established by parol evidence. Such ground of objection was not stated in the court below, and hence, under the well-settled rule, will not be considered on appeal. *Malott v. Central Trust Co.* (1907), 168 Ind. 428, 79 N. E. 369, 11

Ann. Cas. 879. However, there was no error

12. in admitting such evidence. Its effect was to permit appellee to testify as to the belief which such declarations induced in him. Such belief was an essential element in appellee's right of recovery. *Southern Development Co. v. Silva* (1887), 125 U. S.

Federal Life Ins. Co. v. Weedon, Admr.—68 Ind. App. 529.

247, 8 Sup. Ct. 881, 31 L. Ed. 678; 12 R. C. L. §109, p. 355. Under such circumstances it was competent to prove such fact by the direct testimony of appellee. 10 R. C. L. §116, p. 946; *Parrish v. Thurston* (1882), 87 Ind. 437.

For reasons stated, we conclude that the court did not err in overruling appellants' motion for a new trial. Finding no reversible error in the record, the judgment is affirmed.

NOTE.—Reported in 119 N. E. 725.

FEDERAL LIFE INSURANCE COMPANY v. WEEDON,
ADMINISTRATOR.

[No. 9,403. Filed February 28, 1918. Rehearing denied May 2, 1918. Transfer denied November 21, 1918.]

1. INSURANCE.—*Life Insurance.—Action on Policy.—Complaint.—Sufficiency.*—In an action on an insurance policy, where the complaint alleged that the insurer refused to accept premiums and annual dues unless insured consented to the placing of an unlawful lien upon the policy, it was unnecessary to allege or prove an offer to perform. p. 536.
 2. APPEAL.—*Review.—Ruling on Demurrer.—Scope of Review.*—Where a demurrer to the complaint was overruled, the only objections available on appeal under §§344, 348 Burns 1914, Acts 1911 p. 415, are those specified in the memorandum accompanying the demurrer. p. 536.
 3. INSURANCE.—*Life Insurance.—Action on Policy.—Complaint.—Failure to Set Out Reinsurance Contract.*—In an action on an insurance policy which was reinsured by another company, the complaint is not defective for failure to allege that the reinsurance contract between the companies was written, or because it was not made part of the complaint. p. 536.
 4. INSURANCE.—*Life Insurance.—Action on Policy.—Answer.—Sufficiency.*—In an action on a life insurance policy which was reinsured by a successor to the issuing company, an answer alleging that the insured accepted the reinsurance policy, including the
- VOL. 68—34.

Federal Life Ins. Co. v. Weedon, Admr.—68 Ind. App. 529.

- terms and conditions of the reinsurance contract between the companies and denying that insured performed its conditions, is defective as being an argumentative denial. p. 537.
5. **APPEAL.—Review.—Harmless Error.—Ruling on Demurrer.**—Error, if any, in sustaining a demurrer to a special answer, is harmless where all the material facts properly pleaded therein were admissible under the general denial. p. 538.
6. **INSURANCE.—Reinsurance.—Rights of Insured.**—A reinsurance contract authorized by §4753 Burns 1914, Acts 1897 p. 318, §15, relating to the transfer of risks between insurance companies is invalid in so far as it attempts to waive or destroy insured's existing rights. p. 538.
7. **APPEAL.—Review.—Harmless Error.—Variance.—Statute.**—Under the provisions of §400 Burns 1914, §391 R. S. 1881, an alleged variance between pleading and proof regarding the name of an insurance company, whose policies defendant company reinsured, will be deemed immaterial where it is not shown that defendant was misled to its prejudice in maintaining its defense upon the merits. p. 539.
8. **TENDER.—Waiver.**—A formal technical tender is not waived by a mere assertion of a lien or claim in excess of the amount due, since a tender of the proper sum might be accepted. p. 541.
9. **INSURANCE.—Life Insurance.—Action on Policy.—Insurer's Refusal to Perform.—Evidence.**—In an action on a life insurance policy, the insurer's letter to insured notifying him of certain liens on the policy, held to warrant the inference that the insurer would refuse to accept premiums, unless insured consented to the placing of such liens on the policy, so that an offer by insured to perform was unnecessary. p. 541.

From Clinton Circuit Court; *Joseph Combs*, Judge.

Action by George W. Weedon, administrator with the will annexed of the estate of Elsie McMurray Hartman, against the Federal Life Insurance Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Charles A. Atkinson, Sheridan & Gruber and Larz A. Whitcomb, for appellant.

William L. Barnum, Jr., and Owen E. Brumbaugh, for appellee.

IBACH, C. J.—Appellee brought this suit on a policy of insurance issued by the Masons' Union Life Association July 23, 1892, on the life of James S. McMurray (hereinafter referred to as the insured) for \$3,000, payable to the decedent or her heirs, and on a policy of reinsurance issued to the insured by appellant dated July 16, 1904.

The complaint is in three paragraphs, to each of which a demurrer for want of facts was overruled, and appellant answered in six paragraphs, the first a general denial and five paragraphs of special answer. A demurrer to each paragraph of special answer was sustained. There was a trial by the court without the intervention of a jury, and upon request the court made a special finding of facts and stated its conclusions of law thereon, which are in substance as follows:

On July 23, 1892, the Masons' Union Life Association was a mutual life insurance company organized and existing under the laws of this state and engaged in the business of insuring its members, but not for pecuniary profit. On that date the insured became a member of said association, and upon the payment of a premium of \$9 and an agreement to pay a like sum on or before the 20th day of each month for fifteen years, together with certain dues, amounting to \$9 annually, the association issued to him a policy of insurance or certificate of membership No. 1719, whereby it promised and agreed to pay to his daughter, the decedent herein, or her heirs, as beneficiary, the sum of \$3,000 upon satisfactory proof of the death of the insured. On January 13, 1897, the name of said association was changed to the Union Life Insurance Company. The insured in all things kept

and performed the matters and things which were on his part to be kept and performed according to said policy of insurance from July 23, 1892, up to and including July 16, 1904. The appellant, Federal Life Insurance Company, was on July 16, 1904, and ever since has been, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, is now, and was at the times mentioned in the finding, engaged in the business of insuring the lives of persons for pecuniary profit. On the date last mentioned, through a certain business transaction, the Union company transferred and appellant took over all of its property and assets and members and outstanding insurance risks on the lives of persons then in existence in the Union company, including that of the insured. For and in consideration of such transaction and transfer, appellant assumed and guaranteed the liability of the Union company to the insured and his beneficiary, Elsie K. McMurray Hartman, she having previously intermarried with, and then was the wife of, one Charles W. Hartman, under his policy above referred to, and issued to the insured its certain contract of insurance in the words and figures following:

“Incorporated under the Laws of Illinois.

“Federal Life Insurance Company.

“Chicago.

“Number	Amount
8166	\$3000

“This Policy of Reinsurance is Issued to James S. McMurray

“to be attached to certificate or policy No. 1719 of the Union Life Insurance Company of Indiana, and subject to all the provisions of the con-

tract of reinsurance between said Union Life Insurance Company and this company, dated July 16, 1904, constitutes policy No. 8166 of the Federal Life Insurance Company of Chicago, Illinois. Whereas, the said Federal Life Insurance Company does hereby assume the foregoing certificate or policy of said Union Life Insurance Company in accordance with the terms of said reinsurance contract, Now Therefore, this policy and the said certificate to which it is to be attached constitute the holder thereof a policy holder of the said Federal Life Insurance Company, and the said Federal Life Insurance Company hereby assumes and guarantees any liability which may hereafter be established on account of such original policy or certificate subject to the terms and conditions hereof and of said reinsurance contract; Provided that all premiums required to maintain such policy or certificate in force shall be paid to the said Federal Life Insurance Company as provided in said original policy or certificate and said reinsurance contract. No change of policy or certificate further than the attachment of this reinsurance policy to said policy or certificate of the said Union Life Insurance Company is necessary in order to bind the said Federal Life Insurance Company to the payment of the same, subject to the provisions hereof and of said reinsurance contract. In witness whereof," etc.

From July 16, 1904, up to the — day of August, 1905, the insured, "in all things fully observed, kept, performed and fulfilled all and singular the matters and things which were on his part to be observed,

kept, performed and fulfilled according to the conditions, form and effect of the said policy or contract of insurance." On June 27, 1905, appellant notified the insured that it would not pay his beneficiary the sum of \$3,000 in the event of his death, but would only pay said sum less a certain reserve lien on said policy of \$354.35, which appellant asserted existed against said policy, and demanded of insured that he pay, in addition to the premium and annual dues provided in his said contract, the further sum of \$17.72 annually in advance as interest at five per cent. upon said so-called reserve lien, and further notified the insured that it would not thereafter accept and receive from him the premiums and annual dues thereafter under the terms of said original contract to become due and payable, except upon condition that he would consent and agree to the placing of said so-called reserve lien upon his policy. The insured was at all times ready and willing to pay at the time the same became due the subsequently accruing premiums and annual dues according to the terms and tenor and effect of his original contract with the Union Life Insurance Company, but refused to consent to the placing of said reserve lien upon his policy, and refused to pay the \$17.72 annual interest on said lien. On July 12, 1905, the insured was further notified by appellant that there was a certain impairment lien of \$2,103.70 against his policy, but if he would take another medical examination and the report thereof should be satisfactory to them, the company would remove said impairment lien. Upon receiving information from appellant of the placing of said liens against his policy, the insured wrote appellant and inquired what his policy would be worth at that time in case of his

death, and appellant informed him that his policy of \$3,000 would only be worth that sum less the amount of the two liens, to wit, \$2,457.42. Thereafter the insured refused to pay any more premiums or annual dues upon said policy of insurance, and appellant did on July 23, 1905, when the next premium and annual dues became due, declare the policy canceled and of no effect, because of the refusal of the insured to consent to the placing of said liens against his policy, and of his refusal to pay the additional premium and interest on the so-called reserve lien. On July 14, 1905, the insured wrote appellant a letter asking it to designate a medical examiner, and stating that he would take the examination on July 15, 1905. The appellant designated Dr. Doyal of the city of Frankfort, Indiana, to make such examination, and so notified the insured. The latter made application to and was examined by Dr. Doyal at the expense of appellant for the removal of said impairment lien, and said application and examination were received at its home office in Chicago, August 4, 1905, and the said impairment lien upon said policy was removed, and on August 5, 1905, the insured was notified of that fact, and that the item of \$19.44 was credited on said reserve lien. On February 25, 1908, the insured died, leaving the beneficiary named in the original policy surviving. The Union Life Insurance Company after July 16, 1904, when it transferred all of its assets and insurance risks to the appellant, ceased to exist, and did not thereafter maintain any office for the transaction of business.

Other findings relating to the death of the beneficiary, the probate of her will, demand for payment, and proof of death are omitted.

Upon such finding the court stated its conclusions of law, to the effect that there is due, and the plaintiff is entitled to recover from the defendant the sum of \$3,000, with interest at the rate of six per cent. per annum from and after May 18, 1910.

Numerous errors are assigned and relied on for reversal. The first to fifth, inclusive, relate to the sufficiency of the complaint and each para-

1. graph thereof. It is claimed that the third paragraph is insufficient, because it does not allege any offer on the part of the insured to comply with his part of the agreement. It is alleged in said paragraph, among other things, that appellant notified the insured that it would not accept the premiums and annual dues under the terms of said contract, except upon condition that he would consent and agree to the placing of a reserve lien, etc., on his policy, which was unlawful and in violation of the contract between the insured and said association, which the appellant assumed. Under such circumstances it was not necessary to allege or prove an offer to perform on the part of the insured. *Willcuts v. Northwestern, etc., Ins. Co.* (1882), 81 Ind. 300, 312.

The only other objections pointed out by the memorandum accompanying the demurrer to such paragraphs, and consequently the only objections

2. available here (§§344, 348 Burns 1914, Acts 1911 p. 415) are, in effect, that the reinsurance contract is not alleged to be in writing and is
3. not made a part of the second and third paragraphs of complaint. These questions have been passed upon by the Supreme Court and this court, and the principles of law involved firmly set-

tled against the contention of appellant. *Federal Life Ins. Co. v. Kerr* (1910), 173 Ind. 613, 89 N. E. 398, 91 N. E. 230; *Federal Life Ins. Co. v. Petty* (1912), 177 Ind. 256, 97 N. E. 1011; *Federal Life Ins. Co. v. Arnold* (1910), 46 Ind. App. 114, 90 N. E. 493, 91 N. E. 357; *Federal Life Ins. Co. v. Risinger* (1910), 46 Ind. App. 146, 91 N. E. 533; *Federal Life Ins. Co. v. Lillibridge* (1912), 51 Ind. App. 704, 98 N. E. 1015.

Assignments of error 6 to 10, inclusive, call in question the sufficiency of each paragraph of special answer. The second, third, and fourth para-

4. graphs may be discussed together. In each of said paragraphs it is alleged, among other things, that the insured received and accepted said reinsurance policy, *including the terms and conditions of said reinsurance contract*, and then denies that the insured performed according to the conditions of said *contract of reinsurance*. We think the facts pleaded bring these answers within the principle that "a plea setting up a different contract from the one declared on is bad as amounting to the general issue." It is an argumentative denial of the contract instead of being a direct denial. 9 Cyc 731, 732; *Kimball v. Boston, etc., R. Co.* (1882), 55 Vt. 95, 99; *Hayselden v. Staff* (1836), 5 Ad. & Ell. 153.

In the case last cited Lord Denman said: "What, in correct language, may be said to amount to the general issue is, that, for some reason specially stated, the contract does not exist in the form in which it is alleged, and, where that is the case, it is an argumentative denial of the contract, instead of being a direct denial; and which, according to the correct rules of pleading, is not allowed."

Furthermore, appellant was not harmed by said rulings for all the material facts properly pleaded therein were admissible under the general denial. *Penn Mut. Life Ins. Co. v. Norcross* (1904), 163 Ind. 379, 393, 72 N. E. 132.

In this connection it may be said that all the evidence offered by appellant was in fact admitted under the general denial and all the specific facts alleged in its several answers were found by the court and therefore appellant could not have been harmed.

The fifth and sixth paragraphs are not materially different from those discussed, except that in each there is an attempt on the part of appellant to show that the insured (through certain acts and conduct, specifically averred) became bound by the contract of reinsurance between the two companies and with all the terms thereof; that by failing and refusing to comply with the conditions thereby imposed his policy was abandoned and allowed to lapse.

If we are correct in our former conclusion, then these paragraphs are also bad for the same reason given in our discussion of the second, third

6. and fourth paragraphs. We are not confined, however, to that reason alone. The statute under which the transfer is authorized and made is a public law (§4753 Burns 1914, Acts 1897 p. 318) and enters into the contract itself. That statute contemplates the transfer of all risks as they stand related to the original insurer at the time of the transfer. Whatever force the so-called reinsurance contract may have, if it has any, beyond the assumption of liability, is the obligation assumed by the reinsurer of that which the former contract and law impose. This is not an ordinary contract such as an individual

could have made, but is a contract made for the insured pursuant to statute, and that statute manifestly intends that in the reinsurance it shall be the taking over of the obligations of the one company by the other, as they exist at the time. Under such statute and the construction placed thereon by the Supreme Court of this state we must hold that the reinsurance contract between the Union Life Insurance Company and appellant is invalid so far as it attempts to waive or destroy subsisting rights of the insured. *Federal Life Ins. Co. v. Kerr, supra; Federal Life Ins. Co. v. Petty, supra; Federal Life Ins. Co. v. Arnold, supra.* The allegations in said paragraphs with reference to the reinsurance contract therefore were immaterial and no substantial right of appellant was affected by the sustaining of said demurrers.

It is next insisted by appellant under its motion for a new trial that the findings of the court are not sustained by sufficient evidence. Considerable

7. space in its brief is devoted to a discussion of an alleged variance between the pleading and proof with respect to the names of the original company. It is not shown that appellant was misled to its prejudice in maintaining its defense upon the merits, and therefore such variance must be deemed immaterial. §400 Burns 1914, §391 R. S. 1881. It is not disputed that policy No. 1719, issued by the Masons' Union Life Association, which company afterwards changed its name to the Union Life Insurance Company, was one of the policies taken over by appellant under its contract of reinsurance with the last-named company. Whether or not a change of name could be perfected in the manner shown by the evidence is not a proper subject to be litigated in this

action. The acts of the corporation cannot be collaterally attacked in this way. The error, if any, was harmless.

It is apparent from the finding of facts that it is based on the third paragraph of complaint. Appellant, in discussing the sufficiency of the evidence, contends that the third paragraph alleges both full performance and an excuse for nonperformance, and that the finding contains both findings of full performance and excuse for nonperformance, and is therefore contrary to law, and is not supported by any evidence. Neither the third paragraph nor the finding referred to are subject to the construction counsel for appellant seek to place upon them. There is an allegation and a finding of performance up to the time the insured was notified by appellant that future payments would not be accepted and an excuse for not making or tendering further performance.

Appellant further contends that there is no evidence to support or tending to support the finding that it "would not thereafter accept and receive from him (the insured) the premiums and annual dues thereafter under the terms of the original contract to become payable except on condition that he would consent and agree to the placing of said so-called reserve lien * * * upon his said policy;" or that the insured "was at all times thereafter ready and willing to pay at the time the same became due the subsequently accruing premiums and annual dues" according to his original contract.

The theory of the third paragraph of complaint is that the insured performed his contract until notified by the company that it would not accept further performance in accordance with the original policy, and

alleges his readiness and willingness to fully perform on his part, and is based on that principle of law that, where one party avows an intention not to perform, it will excuse the other from offering to perform his part of the contract.

It has been held that an insurance company, by demanding more than it is entitled to receive, and notifying the insured that nothing but a compliance with the demand will be deemed performance, will excuse the latter from tendering the premium. *Willcuts v. Northwestern, etc., Ins. Co., supra*.

But, before it can be said that a formal tender is waived, the tenderee must have placed himself in such position as would make a tender an un-

8. necessary act. A formal technical tender is not dispensed with by a mere assertion, without more, of a lien or claim in excess of the actual amount due, for a tender of the proper sum might be accepted. *Indiana Bond Co. v. Jameson* (1899), 24 Ind. App. 8, 12, 56 N. E. 37; *Hoyt v. Sprague* (1872), 61 Barb. (N. Y.) 497; 38 Cyc 136. See, also, *Indiana Life, etc., Co. v. Reed* (1913), 54 Ind. App. 450, 459, 103 N. E. 77.

The only evidence on this branch of the case consists of certain letters from the appellant company to the insured, the material parts of which

9. are as follows: On June 27, 1905, appellant wrote the insured as follows:

“Dear Sir: Re Federal Policy No. 8166 Union No. 1719. I am pleased to make report as follows on the condition of said policy at the time of its transfer to the Federal Life Insurance Company:

1. Amount of lien for reserve.....\$ 354.35

 Federal Life Ins. Co. v. Weedon, Admr.—68 Ind. App. 529.

2. Amount of Lien for impairment...	\$ 2103.70
Less pro rata credit on account of assets transferred from the Union Life to the Federal Life.....	\$ 19.44

 Net impairment\$ 2084.26

3. Federal premium for similar policy.	\$ 91.56
--	----------

4. Union Life Premium.....	\$ 58.50
----------------------------	----------

The 'assessment clause' in your policy has been eliminated, your policy has been placed upon a legal reserve basis and item No. 1 represents the reserve for the proper protection of this policy. This amount not having been accumulated and transferred by the Union Life to this Company with the insurance is considered as having been loaned to you at 5% interest payable annually in advance. This loan may be repaid at your pleasure or allowed to stand until a settlement be made under the policy, at which time it will be deducted from the proceeds. If repaid it may be reborrowed as a whole or in part at your pleasure. * * * Item No. 2 is intended in some measure to compensate the Company for deterioration of vitality occasioned by the lapse of time since you passed a medical examination. This portion of the debt draws no interest and may stand against the policy until a settlement be made thereunder, being deducted at that time or it will be reduced or removed if you pass a medical examination satisfactory to our Medical Department. On application a local examiner will be designated before whom you may appear for examination at our expense. If the impairment lien be removed, said pro rata credit

Federal Life Ins. Co. v. Weedon, Admr.—68 Ind. App. 529.

will be applied to reduce the reserve lien. If the impairment lien be not removed, all further premium payments will be applied as made to reduce it. * * * I have written you thus fully because I desire you to know the exact facts regarding your policy. * * *

Under date of July 12, 1905, appellant wrote the insured as follows:

“Your esteemed favor of recent date, relating to policy 8166, is at hand and carefully noted. In reply will say that this policy is carried on a semi-annual basis. The regular Federal premium for a policy such as yours issued at your original age of fifty-four is \$91.56, payable semi-annually, the policy being for \$3,000. This is the maximum premium which we reserve the right to collect on this policy. However, until further notice you have the privilege, if you desire, to continue your former Union premium of \$58.50 semi-annually, in which case the difference between the smaller and the larger premium will be charged against your policy as a loan and draw 5% interest payable annually until paid in cash or until some other settlement is made under the policy. If all premiums be paid in full to the date of death, the amount to be deducted from the face of the policy at this time, would be approximately \$2500. * * *

Under the principles of law above announced, and in view of the express finding that after the receipt of the letters above referred to the insured applied for and was examined for the purpose of removing the so-called impairment lien and that said lien was

removed, can it be said that the evidence above set out warranted the inference that appellant "would not thereafter accept and receive from him (the insured) the premiums and annual dues thereafter under the terms of the original contract to become payable except on condition that he would consent and agree to the placing of said so-called reserve lien * * * upon his said policy?" While the evidence is far from being conclusive, we are of the opinion that such inference was warranted.

Other questions are raised, but in our discussion we have disposed of the controlling ones, and further disposition is unnecessary.

Finding no available error in the record, the judgment must be affirmed. Judgment affirmed.

NOTE.—Reported in 118 N. E. 842.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK v.
GULLER, GUARDIAN.

[No. 9,508. Filed April 2, 1918. Rehearing denied June 28, 1918.
Transfer denied November 21, 1918.]

1. INSURANCE.—*Contracts.—Construction.*—The rule that it is the duty of the court to ascertain the intention of the parties and to give effect thereto, applies to insurance as well as to other contracts, and the words used will be given their plain, ordinary and popular meaning, unless there is something in the contract to indicate a different meaning. p. 549.
2. INSURANCE.—*Life Insurance.—Construction of Policy.—Suicide.*—"By his Own Act".—A provision in a life insurance policy, avoiding it if the assured should die "by his own act," refers to suicide only, and does not include death of a woman from septicemia following an operation to produce a miscarriage. p. 549.
3. APPEAL.—*Review.—Ruling on Demurrer.—Insufficient Memo-*

Mutual Life Ins. Co. v. Guller, Gdn.—68 Ind. App. 544.

random.—*Scope of Review.*—*Statute.*—Although §344 Burns 1914, Acts 1911 p. 415, providing that when a demurrer to a complaint is filed for want of facts, a memorandum shall be filed therewith stating wherein the pleading is insufficient, applies to a demurrer to an answer, it is not reversible error to sustain a demurrer to an answer accompanied by an insufficient memorandum if such ruling was correct, since the court on appeal, may go behind the memorandum to determine the correctness of the ruling in order to sustain the trial court. p. 551.

4. *INSURANCE.*—*Life Insurance.*—*Death From Illegal Operation.*—*Insurer's Liability.*—*Public Policy.*—Where a policy of life insurance, procured and issued in good faith, was payable to beneficiaries, with the right reserved in the insured to change the same, so that they acquired a defeasible vested interest in the policy at the time of its issuance, public policy does not prohibit recovery on the policy by such beneficiaries where insured died from septicemia resulting from a criminal operation, the policy not expressly providing against liability for death from such a cause. p. 551.

From Gibson Circuit Court; *Simon L. Vandever*, Judge.

Action by Nicholas C. Guller, as guardian of Mary M. Guller and others, against the Mutual Life Insurance Company of New York. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Morton C. Embree, Lucius C. Embree and Frederick S. Allen, for appellant.

Henry Johnson and Byron M. Johnson, for appellee.

BATMAN, P. J.—This is an action commenced by appellee to recover on a policy of life insurance, issued by appellant on the life of one Grace Guller, now deceased, in the sum of \$1,000, in which appellee's wards, Mary M. Guller, John D. Guller, and Jewel N. Guller, were named as beneficiaries. The complaint is in a single paragraph in the usual form, a copy of such policy being made a part thereof by

exhibit. Appellant filed an answer in three paragraphs. Each of said paragraphs contains the following admissions and allegations of facts: It is admitted that the policy in suit was issued on March 14, 1914; that appellee's said wards were named as beneficiaries therein; that all the premiums due thereon had been paid; and that due proofs of the death of said Grace Guller had been furnished appellant. It is alleged that on the date on which said policy was issued the said Grace Guller was a married woman; that subsequently, on November 15, 1914, the said Grace Guller, with the intent then and there and thereby to procure her miscarriage, voluntarily submitted to a criminal operation, and caused a criminal operation to be performed upon her, the said Grace Guller then and there being pregnant; that said criminal operation was dangerous to life, and at the time known by the said Grace Guller to be so; that said operation was not performed by a physician for the purpose of saving the life of either the said Grace Guller, or of the child with which she was pregnant; that as a result of said criminal operation the said Grace Guller did miscarry, and thereafter, on December 2, 1914, died of septicemia, following and caused by such miscarriage; that her death resulted directly from, and was proximately caused by her own act, in procuring said criminal operation and voluntarily submitting thereto; that as soon as appellant became cognizant of the facts above stated, to wit, on October 6, 1915, it tendered to appellee as such guardian, in good and lawful currency of the United States of America the sum of \$22.85, the same being the amount of the premium paid by the said Grace Guller on said policy, together with interest

thereon at the rate of six per cent. per annum from April 18, 1914, to October 6, 1915; that said tender was refused by appellee; and that it has paid said money into court for the use of appellee.

The said first paragraph of answer contains the following special allegations, not found in either of the other paragraphs: "The defendant says, however, that the plaintiff ought not to have and recover in this action for the reason that said policy of insurance was issued upon, and contained as a part thereof, and as a part of a contract of the defendant with the said Grace Guller, certain terms and conditions in respect to the liability of the defendant to the beneficiaries thereunder, in the event of the death of the said Grace Guller, among which was the following express condition, namely: The company shall not be liable hereunder in the event of the insured's death by his own act, whether sane or insane, during the period of one year after the date of the issue of this policy, as set forth in the provisions of the application endorsed hereon or attached hereto."

The second paragraph of answer contains the following special allegations not found in either of the other paragraphs: "The defendant says, however, that the plaintiff ought not to have and recover in this action for the reason that said policy of insurance was issued upon, and in pursuance of, a written application therefor made to it by the said Grace Guller, a copy of which is hereto attached and made a part of this answer, marked 'Exhibit A'; that a copy of said application was made a part thereof, and a part of the contract of insurance thereby evidenced, and said policy and said application became and constituted the entire contract between said defendant and the

said Grace Guller; and the defendant charges that said policy was issued in consideration of, and its validity depended upon, the statements, agreements, conditions and warranties therein, made by the said Grace Guller, and each one of them, and that among said statements, agreements, conditions and warranties was the following express understanding and agreement, to wit: It is understood and agreed that the risk of death will not be covered by the policy if such death occur by my own act, whether sane or insane, during the period of one year next following the date of issue."

The third paragraph of answer contains the following special allegations, not found in either of the other paragraphs: "The defendant further says that the act of the said Grace Guller, in so submitting to said operation was in violation of law, and was grossly immoral; that a death so caused was not insured against by said policy; that by reason of the acts above stated, said policy has become, and is now, null and void; and that it is contrary to public policy to permit a recovery thereon."

To each of said paragraphs of answer appellee filed a demurrer for want of facts, accompanied by a memorandum of the grounds on which the same was based. This demurrer was sustained as to each of said paragraphs, and an exception was duly reserved. Appellant refused to plead further, and thereby elected to stand upon its answer. Judgment was thereupon rendered against appellant upon the pleadings in the sum of \$1,019 and costs. From this judgment appellant prosecutes this appeal, and has assigned the sustaining of appellee's demurrer to each

Mutual Life Ins. Co. v. Guller, Gdn.—68 Ind. App. 544.

of its paragraphs of answer, as the errors on which it relies for reversal.

The sufficiency of the first and second paragraphs of such answer involves the same question, and will be considered together. It will be noted that the first paragraph is based on a clause of the policy, which provides against liability "in the event of the insured's death by his own act," while the second paragraph is based on a clause of the application, which provides against liability, "if such death occur by my own act." The question arises over the meaning of the words "death by his own act" and "death * * * by my own act." Appellee contends that they mean death by suicide and nothing more; that the death of the insured in the manner and from the cause alleged was not death by suicide; and, therefore, such paragraphs are insufficient. Appellant contends that the words in question have a broader meaning than the term "suicide"; that they embrace every case of death by one's own act, except death by accident, or from an act which, at the time it was entered upon, was not expected or intended to result in death; that death in the manner and from the cause alleged comes within their meaning; and therefore such paragraphs are sufficient.

In construing a contract it is the duty of the court to ascertain the intention of the parties, and give effect to such intent. In so doing words used

1. are to be understood in their plain, ordinary and popular sense, unless there is something in the contract to indicate a different meaning.
2. *Straus v. Yeager* (1911), 48 Ind. App. 448, 93 N. E. 877. This rule applies to insurance as well as to other contracts. *Modern Woodmen, etc. v.*

Miles (1912), 178 Ind. 105, 97 N. E. 1009. It is apparent that when the words in question are so considered, they must be held to mean suicide. Such interpretation is evidently in accord with the popular understanding, and, as there is nothing to indicate the contrary, such meaning must be accepted. The courts of other jurisdictions have ascribed such meaning to them when so used. *Supreme Lodge, etc. v. Gelbke* (1902), 198 Ill. 365, 64 N. E. 1058; *Mutual Life Ins. Co. v. Wiswell* (1896), 56 Kan. 765, 44 Pac. 996, 35 L. R. A. 258. In the case last cited the court said, on page 768: "But the courts are in general accord in holding that the words of a condition avoiding the policy if the assured shall die 'by his own hand' or 'by his own act' are equivalent to a proviso against suicide or intentional self-destruction." This is in accord with the view of this court, as expressed in the case of *North American Union v. Oleske* (1917), 64 Ind. App. 435, 116 N. E. 68, where it is held that the words "die by his own hand or act" mean suicide. The conclusion we have reached finds support in the fact that the clause of the policy under consideration has for a heading the word "suicide." This was also true in the case last cited, and such fact was held to be significant in determining what the parties understood to be the meaning of the words quoted. While the word "suicide" does not appear as a heading to the clause in the application on which the second paragraph of answer is based, the language used is of similar import to that used in the clause of the policy on which the first paragraph of answer is based, and must be held to have the same meaning. The cause of death described in each the first and second paragraph of answer is the

same. It did not result from suicide, as the essential elements of intention and expectation are absent. *Northwestern, etc., Ins. Co. v. Hazelett* (1886), 105 Ind. 212, 4 N. E. 582, 55 Am. Rep. 192. For the reasons stated it follows that the court did not err in sustaining the demurrer to either the first or second paragraph of such answer.

Appellant contends that the demurrer to the third paragraph of answer presents no question, because of the insufficiency of the memorandum

3. filed with the demurrer thereto. This contention cannot be sustained. While it is true that §344 Burns 1914, Acts 1911 p. 415, has been construed to apply to an answer as well as a complaint, it does not follow that a cause should be reversed because the court sustains a demurrer to a paragraph of answer where the memorandum is insufficient. If the ruling thereon was correct, no error was committed, and this court may look beyond the memorandum for the purpose of ascertaining such fact, in order to sustain the ruling of the trial court. *Bruns v. Cope* (1914), 182 Ind. 289, 105 N. E. 471; *Parker v. Hickman* (1916), 61 Ind. App. 152, 111 N. E. 649.

Appellant bases its third paragraph of answer on the ground of public policy. As preliminary to a consideration of the sufficiency of such para-

4. graph the following should be noted: (1) The policy in suit is made to mature on the death of the insured; (2) no limitations are placed on the cause of death, except suicide during the period of one year after the date of the issue of such policy; (3) the beneficiaries named in the policy are the children of the insured, subject to her right to change

the same; (4) there is no charge that such policy was procured or issued in contemplation of the commission of any unlawful act. It thus appears that this paragraph of answer involves a question that may be stated as follows: What effect is produced upon a policy of life insurance which has been procured and issued in good faith, and hence valid at its inception, where the death of the insured results from his criminal act, and such policy does not expressly provide against liability for death from such a cause? This question does not appear to have been determined in this state, but the principles involved have been considered and applied in many jurisdictions. In so doing the courts, as a rule, have taken into account two different classes of life insurance policies, one class being those policies made payable to the insured himself, or to his personal representatives by some appropriate designation, and the other class being those policies in which some third person or persons are designated as beneficiaries. The reason for this classification is based on the fact that the proceeds of the policies of the former class become a part of the insured's estate on his death, and is subject to the claims of his creditors, if not otherwise disposed of by the insured; while the proceeds of the policies of the latter class do not become a part of the insured's estate on his death, are not subject to administration by his personal representatives, but are payable to the designated beneficiaries direct, by virtue of a vested interest acquired in such policies at the time of their issuance. A failure to note such distinction will lead to confusion in considering the decided cases applicable to the question under consideration.

As a general rule, the courts hold that under the

former class of policies there can be no recovery, if the insured has intentionally caused his own death, although such policies may be silent in that regard. Some of such decisions are based on the doctrine that life insurance policies are contracts which involve the highest good faith of the contracting parties, and hence an insured may not hasten the event which matures the policy and profit thereby. Others are based on an implication that death from such causes is excepted from the conditions which create a liability. While still others are based solely on the grounds of public policy. Among the cases so holding for the reasons stated are the following: *Ritter v. Mutual Life Ins. Co.* (1898), 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693; *Davis v. Supreme Council, etc.* (1907), 195 Mass. 402, 81 N. E. 294, 10 L. R. A. (N. S.) 722, 11 Ann. Cas. 777; *Shipman v. Protected Home Circle* (1903), 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347; *Mutual Life Ins. Co. v. Kelly* (1902), 114 Fed. 268, 52 C. C. A. 154. The same principle has been applied to cases where the death of the insured was the result of his unlawful act, or was due to the commission of a crime resulting in the infliction of capital punishment. *Amicable Society v. Bolland* (1830), 4 Bligh N. S. 194; *Hatch v. Mutual Life Ins. Co.* (1876), 120 Mass. 550, 21 Am. Rep. 541; *Wells v. New England, etc., Ins. Co.* (1899), 191 Pa. St. 207, 43 Atl. 126, 53 L. R. A. 327, 71 Am. St. 763; *Burt v. Union Central Life Ins. Co.* (1902), 187 U. S. 362, 23 Sup. Ct. 139, 47 L. Ed. 216; *Northwestern, etc., Ins. Co. v. McCue* (1912), 223 U. S. 234, 56 L. Ed. 419, 38 L. R. A. (N. S.) 57.

In regard to the latter class of policies, viz., those payable to designated third persons as beneficiaries,

the courts hold, as a rule, that a recovery may be had, notwithstanding the insured has intentionally caused his own death, where the policies are silent in that respect. Such determination is usually based on the theory that such beneficiaries acquired a vested interest in such policies at the time of their issuance, and thereafter their rights cannot be affected, by the wrong of the insured, for whose acts they are in no way responsible. Among the cases so holding are the following: *Supreme Council, etc. v. Pels* (1903), 110 Ill. App. 409; *Supreme Lodge, etc. v. Kutscher* (1897), 72 Ill. App. 462; *Parker v. Des Moines Life Assn.* (1899), 108 Ia. 117, 78 N. W. 826; *Supreme Conclave, etc. v. Miles* (1901), 92 Md. 613, 48 Atl. 845, 84 Am. St. 528; *Kerr v. Minnesota, etc., Assn.* (1888), 39 Minn. 174, 39 N. W. 312, 12 Am. St. 631; *Fitch v. American, etc., Ins. Co.* (1875), 59 N. Y. 557, 17 Am. Rep. 372; *Grand Legion, etc. v. Beaty* (1906), 224 Ill. 346, 79 N. E. 565, 8 L. R. A. (N. S.) 1124, 8 Ann. Cas. 160; *Seiler v. Economic Life Assn.* (1898), 105 Ia. 87, 74 N. W. 941, 43 L. R. A. 537; *Morris v. State, etc., Assurance Co.* (1897), 183 Pa. St. 563, 39 Atl. 52; *Patterson v. Natural Premium, etc., Ins. Co.* (1898), 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. 899; *Shipman v. Protected Home Circle, supra*.

The decided cases are not uniform in giving effect to the distinction between the two classes of policies as indicated. Thus decisions may be found which hold that a recovery ought to be permitted on policies of the former class, viz., those payable to the insured or his legal representatives, where there is no provision against liability for death resulting from the causes stated. The line of reasoning usually relied on in such decisions is to the effect that the insurer

has expressly agreed to pay on the death of the insured, without excepting death from such causes; that there is no adequate reason for disregarding the terms of the contract on the ground of public policy, and no more cause for inferring forfeiture of insurance, where death results from such causes, than for requiring attainder, or forfeiture of other property belonging to the insured. Among the cases to this effect are the following: *Collins v. Metropolitan Life Ins. Co.* (1908), 232 Ill. 37, 83 N. E. 542, 14 L. R. A. (N. S.) 356, 122 Am. St. 54, 13 Ann. Cas. 129; *Mills v. Rebstock* (1882), 29 Minn. 380, 13 N. W. 162; *Campbell v. Supreme Conclave, etc.* (1901), 66 N. J. Law 274, 49 Atl. 550, 54 L. R. A. 576.

On the other hand, there are cases which would indicate that third party beneficiaries ought not recover, where death results from the causes under consideration, although the policy be silent in that regard. The line of reasoning usually relied on in such cases is to the effect that death from such causes is not a risk intended to be covered, or which could legally have been covered by the policy; and, if such be the case, it cannot be construed to cover where death results from such causes in favor of any beneficiary whatsoever. Among the cases so indicating are the following: *Mutual Life Ins. Co. v. Kelly*, *supra*; *Burt v. Union Central Life Ins. Co.*, *supra*; *Ritter v. Mutual Life Ins. Co.*, *supra*; *Northwestern, etc., Ins. Co. v. McCue*, *supra*; *Davis v. Supreme Council, etc.*, *supra*.

A careful consideration of the principles involved and authorities cited leads us to conclude that whether the insured die from suicide while sane, or as the result of some unlawful act, or by legal exe-

cution or conviction of crime, the effect on an ordinary life insurance policy must be the same, where it is silent as to death from such causes. It is apparent that the authorities are not in harmony as to what the effect of death from such causes should be, but we are led to believe that the greater weight and better reason is in favor of permitting a recovery by third party beneficiaries, who have acquired a vested interest in such a policy which is silent as to the effect of death from the causes indicated. What effect death from such causes would have upon such a policy payable to the insured himself or to his personal representatives we need not and do not decide.

Directing our attention to the policy in suit, as shown by the exhibit filed with the complaint, we find that it is payable to third party beneficiaries, viz., appellee's wards, who are the children of the insured, with the right reserved in the insured to change such beneficiaries. The third paragraph of answer alleges that the insured's death resulted from a criminal act, concerning which the policy is silent. Under the conclusion we have reached, as stated above, it is clear that such answer is insufficient, provided the beneficiaries acquired a vested interest in such policy at the time it was issued, notwithstanding the right reserved in the insured to change the same. As pertinent to this question we find the law to be well settled that a beneficiary in an ordinary life insurance policy has an absolute vested interest therein from the date of its issuance, delivery, and acceptance, where such policy does not authorize a change of beneficiary. *Wilburn v. Wilburn* (1882), 83 Ind. 55; *Damron v. Penn, etc., Ins. Co.* (1885), 99 Ind. 478; *Masons', etc., Ins. Assn. v. Brockman* (1897), 20 Ind.

App. 206, 50 N. E. 493; *Indiana, etc., Life Ins. Co. v. McGinnis* (1913), 180 Ind. 9, 101 N. E. 289, 45 L. R. A. (N. S.) 192. But where such policy authorizes a change of the beneficiary by the insured, such interest is a defeasible vested interest. *Indiana, etc., Life Ins. Co. v. McGinnis, supra*; *Roberts v. Northwestern, etc., Ins. Co.* (1915), 143 Ga. 780, 85 S. E. 1043; *Holder v. Prudential Ins. Co.* (1906), 77 S. C. 299, 57 S. E. 853. It is further settled that where the policy reserves a right in the insured to change the beneficiary, it must be exercised in the specific manner provided therein in order to be effective. *Holland v. Taylor* (1887), 111 Ind. 121, 12 N. E. 116; *Mason v. Mason* (1903), 160 Ind. 191, 65 N. E. 585; *Farra v. Braman* (1908), 171 Ind. 529, 86 N. E. 843; *Indiana, etc., Life Ins. Co. v. McGinnis, supra*.

It is apparent that the beneficiaries acquired a defeasible vested interest in the policy in suit at the time it was issued. It might have been divested during the life of the insured by a change of the beneficiaries. There is no charge in the paragraph of answer under consideration to that effect. We must therefore assume that there was no such divesture, and that such interest continued up to the death of the insured and then became absolute. For the reasons stated we hold that the court did not err in sustaining appellee's demurrer to the third paragraph of answer.

We find no error in the record. Judgment affirmed.

NOTE.—Reported in 119 N. E. 173. See under (2, 4) 25 Cyc 875.

GRAY v. BLANKENBAKER.

[No. 9,637. Filed November 26, 1918.]

1. **APPEAL.—Presenting Question for Review.—Assignment of Error.—Insufficiency of Complaint.**—An assignment of error that the complaint does not state facts sufficient to constitute a cause of action presents no question for review on appeal. p. 561.
2. **APPEAL.—Presenting Questions for Review.—Assignment of Error.**—An assignment of error predicated on overruling a motion to direct a verdict presents no question for review on appeal. p. 561.
3. **NEW TRIAL.—New Trial as of Right.—Time for Motion.—Premature Motion.**—Where, in an action to quiet title, plaintiff's motion for a new trial as of right was filed prior to rendition of judgment on the verdict, it was not error for the trial court to permit him to withdraw such motion and to refile it at the proper time. p. 561.
4. **APPEAL.—Review.—Complaint.—Amendments Deemed Made.**—In an action to quiet title, a judgment for plaintiff will not be reversed because the complaint does not allege that the real estate involved was situated within the state where there was evidence showing that it was so situated, since, in view of §700 Burns 1914, §658 R. S. 1881, providing that no judgment shall be reversed for an imperfection in pleading which might have been amended in the court below, the complaint will be deemed on appeal as having been amended to conform to the evidence. p. 562.
5. **ADVERSE POSSESSION.—Permissive Use of Land.—Rights Acquired.**—A person cannot acquire any right in land as against the owner by a mere permissive use thereof. p. 563.
6. **APPEAL.—Review.—Instructions.—Consideration as a Whole.—Theory of Case.**—It is proper to present the theory of both parties by instructions within the evidence embodying such theories, and it is unnecessary that the whole law involved be stated in a single instruction where the instructions as a whole state the law correctly. p. 564.
7. **APPEAL.—Briefs.—Presenting Questions for Review.—Construction.**—The mere statement in appellant's propositions and points that the court erred in giving certain numbered instructions is not a compliance with the rule of court relating to statement of propositions or points in the preparation of briefs and presents no question for review, although such statement is followed by a reference to a number of abstract propositions of law, none of which are applied to any particular instruction challenged. p. 564.

Gray v. Blankenbaker—68 Ind. App. 558.

8. **APPEAL.—Briefs.—Sufficiency.**—Where appellant directs no point or proposition to grounds for a new trial, the brief falls to comply with the rules governing the preparation of briefs and no question is presented for review, and such failure cannot thereafter be used by a discussion of the alleged errors in the argument. p. 565.
9. **APPEAL.—Review.—Evidence.**—Where the evidence is conflicting the court on appeal will merely determine whether there is any evidence to sustain the verdict. p. 566.
10. **APPEAL.—Presenting Questions for Review.—Objections to Evidence.**—To make alleged error in the admission of evidence available on appeal, the objecting party must state to the trial court, at the time the evidence is offered, the specific objection on which he relies for its exclusion, and only that objection so stated will be considered. p. 567.
11. **APPEAL.—Briefs.—Waiver of Error.**—The failure of appellant to state in his brief any proposition or point with reference to an alleged error predicated on misconduct of counsel in his argument, as required by Rule 22, cl. 5, of the Appellate Court governing the preparation of briefs, waives such error. p. 567.

From Scott Circuit Court; *Robert A. Creigmile*, Judge.

Action by James F. Blankenbaker against James P. Gray and others. From a judgment for plaintiff, defendant James P. Gray appeals. *Affirmed.*

Samuel B. Wells, Elliott & Houston and *Walter G. Meade*, for appellant.

Frank Gardner and *Wilbur W. Hottel*, for appellee.

BATMAN, J.—This is an action brought by appellee in the Washington Circuit Court against Washington county, Indiana, Pierce and Jackson townships in said county, and appellant, to quiet title to certain real estate. The complaint is in a single paragraph in the usual form. All the defendants, except appellant, filed answers disclaiming any interest in the real estate, and the cause was afterwards dismissed as to such defendants. The issues were closed by an

answer in general denial by appellant. The cause was submitted to a jury for trial. Upon request of appellant, the court instructed the jury to return a verdict in his favor, which was accordingly done. Appellee then filed a motion and an undertaking for a new trial as of right. Prior to a ruling thereon appellee filed his motion for leave to withdraw his application for a new trial as of right, which motion was sustained. Judgment was thereupon rendered in favor of appellant on the verdict of the jury. Thereafter appellee again filed a motion and an undertaking for a new trial as of right, which was sustained. The cause was afterwards sent to the Scott Circuit Court on a change of venue, where it was submitted to a jury for trial. At the close of appellee's evidence, appellant moved the court to peremptorily instruct the jury to return a verdict in his favor, which motion was overruled. The jury returned a verdict for appellee. Appellant thereupon filed a motion to dismiss the cause, and thereafter filed a motion for a new trial, both of which motions were overruled. Judgment was then rendered on the verdict, quieting appellee's title to the real estate in question.

Appellant has assigned the following errors on which he relies for reversal: (1) The complaint does not state facts sufficient to constitute a cause of action against him. (2) The court erred in permitting appellee to withdraw his motion and bond for a new trial as of right. (3) The court erred in permitting appellee to refile his motion and bond for a new trial as of right. (4) The court erred in granting appellee a new trial as of right. (5) The court erred in overruling his motion to peremptorily instruct the

jury to return a verdict in his favor. (6) The court erred in overruling his motion to dismiss the cause of action. (7) The court erred in overruling his motion for a new trial. The first assigned error presents no question for our determination. *Riley v. First Trust Co., Admr.* (1917), 65 Ind. App. 577, 117 N. E. 675. The same may be said of the fifth assigned error. *Chicago, etc., R. Co. v. Richards* (1901), 28 Ind. App. 46, 61 N. E. 18; *United States, etc., Ins. Co. v. Batt* (1912), 49 Ind. App. 277, 97 N. E. 195.

The second, third, and fourth assigned errors relate to the action of the court in granting appellee a new trial as of right, and will be considered together. Appellant does not contend that this is not a case in which appellee was entitled to a new trial as of right under the statute in force at the time he made his application therefor, but contends in effect that the filing of his motion and undertaking therefor, prior to the rendition of a judgment on the verdict, defeats his right thereto. This contention cannot be sustained. The filing of appellee's motion for a new trial as of right, before the rendition of a judgment on the verdict, was premature, and, had it not been withdrawn, it would have been the duty of the court to overrule the same. *Personette v. Cronkhite* (1895), 140 Ind. 586, 40 N. E. 59; *Boyd v. Schott* (1899), 152 Ind. 161, 52 N. E. 752; *Davis v. Kendall* (1903), 161 Ind. 412, 68 N. E. 894. This action on the part of appellee, however, did not affect his right to demand a new trial as of right at a proper time. It has been held that the erroneous ruling of the court, on a prior motion for a new trial as of right, did not preclude the granting of such a

new trial on a second application therefor. *Warburton v. Crouch* (1886), 108 Ind. 83, 8 N. E. 634. For a much stronger reason we must hold that such a motion, filed prematurely, but withdrawn before the court ruled on the same, does not render the subsequent action of the court in granting a new trial as of right, on a proper application made at a proper time, erroneous. Appellant cites the case of *Coan v. Grimes* (1878), 63 Ind. 21, to sustain his position, but the facts of that case are so widely different from the case at hand as to render it inapplicable.

Appellant's sixth assigned error challenges the action of the court in overruling his motion to dismiss the cause, made after the jury returned

4. a verdict in favor of appellee. A number of reasons are set out in the motion in support of the same, but all are evidently based on the fact that the complaint does not allege that the real estate in question is situated in the State of Indiana. Appellant claims that by reason of this fact the trial court was without jurisdiction of the subject-matter of the action. This claim cannot be sustained.

It will be noted that this is an action to quiet title to real estate. It was begun in the Washington Circuit Court, and transferred to the Scott Circuit Court on a change of venue, where it was finally tried, and the judgment from which this appeal is prosecuted was rendered. These are courts of general jurisdiction, and therefore the facts which give them jurisdiction of a cause need not affirmatively appear on the face of the complaint. *Kinnaman v. Kinnaman* (1880), 71 Ind. 417; *Whittenberger v. Bower* (1902), 158 Ind. 673, 63 N. E. 307. It has been held that, when the jurisdiction of such courts depends upon the finding

of certain facts, the exercise of jurisdiction implies the finding of such facts. *Evansville Ice, etc., Co. v. Winsor* (1897), 148 Ind. 682, 48 N. E. 592. Moreover, in this case there was evidence that the real estate in question was situated in Washington county, Indiana. Section 700 Burns 1914, §658 R. S. 1881, forbids the reversal of a judgment because of an imperfection in a pleading, which might have been amended in the court below to conform to the evidence. The complaint in this case might have been so amended, and we must so consider it on appeal. *Kuhn v. Powell* (1916), 61 Ind. App. 131, 111 N. E. 639; *Union Frat. League v. Sweeney* (1916), 184 Ind. 378, 111 N. E. 305. It follows that no reversible error was committed in overruling appellant's motion to dismiss.

Appellant's seventh assigned error relates to the overruling of his motion for a new trial. This motion is based in part on the action of the court in

5. giving a series of ten instructions at the request of appellee. Among these instructions are Nos. 18 and 20, which appellant claims are in irreconcilable conflict with instructions Nos. 5 and 7 given by the court at the request of appellant, and hence tended to confuse the jury as to the law of the case. The import of said instructions Nos. 18 and 20 was to inform the jury that appellant could not acquire any right in the land in question by a mere permissive use thereof. That such is the law of this state is well settled by many decisions. *Parish v. Kaspare* (1887), 109 Ind. 586, 10 N. E. 109; *Shellhouse v. State* (1887), 110 Ind. 509, 11 N. E. 484; *Conner v. Woodfill* (1890), 126 Ind. 85, 25 N. E. 876, 22 Am. St. 568; *Smith v. Ponsford* (1915), 184 Ind. 53, 110 N. E. 194; *Kibbey v. Richards* (1902), 30 Ind.

App. 101, 65 N. E. 541, 96 Am. St. 333; *Lucas v. Rhodes* (1911), 48 Ind. App. 211, 94 N. E. 914. Said instructions Nos. 5 and 7 correctly state the

6. law where an interest has been acquired in real estate, through a license which has become irrevocable, because of the expenditure of money or labor upon the faith thereof. These instructions, given at the request of the parties, covered different phases of the case, in accord with their opposing theories. This was proper under the evidence. No attempt was made to state the whole law involved in a single instruction. This was not necessary, as it suffices if the instructions, when taken as a whole, state the law correctly. *Chicago, etc., R. Co. v. Lain* (1914), 181 Ind. 386, 103 N. E. 847; *Danville Trust Co. v. Barnett* (1916), 184 Ind. 696, 111 N. E. 429. Appellant's theory of the case was presented to the jury by the latter instructions, and we see no just ground for complaint because the court presented appellee's theory by the former instructions. We find no error in giving either of said instructions, nor in giving instruction No. 13 at the request of appellee, which is of similar import.

Appellant in his propositions and points has stated that the court erred in giving instructions Nos. 12, 17, 19, 21, 22, 26, and 27. This is not a compliance with the rule relating to a statement of propositions or points in the preparation of a brief. *Evansville, etc., R. Co. v. Hoffman* (1918), 67 Ind. App. 571, 118 N. E. 151. This statement, however, is followed by a reference to eight abstract propositions of law, supported by authorities, none of which are applied to any particular instruction of the number challenged. These fail to supplement the

original propositions or points with reference to said instructions so as to bring them within the rules. *Chicago, etc., R. Co. v. Biddinger* (1916), 63 Ind. App. 30, 113 N. E. 1027. Under these circumstances no question is presented for our consideration with reference to the instructions last named. However, we have carefully examined them in the light of the abstract principles of law stated, and failed to find that the court committed any error in giving the same.

Appellant assigned, among his reasons for a new trial, that the verdict of the jury is not sustained by sufficient evidence and is contrary to law, but

8. has not specifically directed any proposition or point toward these reasons, as required by the rules governing the preparation of briefs. *Cleveland, etc., R. Co. v. Ritchey* (1916), 185 Ind. 28, 111 N. E. 913. A failure to comply with such rules in this regard cannot thereafter be cured by a discussion of the alleged error in the argument. *Moore v. Ohl* (1917), 65 Ind. App. 691, 116 N. E. 9; *Evansville, etc., R. Co. v. Hoffman, supra*. However, we find in appellant's brief, under his seventh assigned error, a number of pages containing abstract propositions of law supported by authorities, following the sub-heads of "Statute of Limitations," "Parol Agreements," and "Easements by Prescription," which we shall assume were intended to apply to the reasons for a new trial stated above. The record discloses that appellant sought to defeat the rights which appellee asserted in his complaint, by proof of certain rights in himself, acquired by contract or by prescription, or through a license which had become irrevocable by reason of the performance of labor or ex-

penditure of money in reliance thereon. On the other hand, appellee asserts that the evidence is of such a character as to show, or at least to justify an inference, that the use of the ways in question were permissive in their origin, and that their use was never under a claim of right, or adverse to his rights or the rights of those under whom he claimed, as owners of the fee. These opposing contentions were submitted to the jury for its determination, under the instructions of the court. The finding was in favor of appellee. The evidence was conflicting and largely parol.

Under these circumstances the only question
9. we are called upon to determine in that regard is whether there is any evidence to sustain the verdict. This is true, although such evidence may be strongly contradicted and not entirely satisfactory. *Thompson v. Beatty* (1909), 171 Ind. 579, 86 N. E. 961; *Warner v. Jennings* (1909), 44 Ind. App. 574, 89 N. E. 908; *Hollingsworth v. Hollingsworth* (1912), 50 Ind. App. 137, 98 N. E. 79; *Monongahela River, etc., Coke Co. v. Walts* (1914), 56 Ind. App. 235, 105 N. E. 160; *Public Utilities Co. v. Cosby* (1915), 60 Ind. App. 252, 110 N. E. 576. There was at least some evidence to support appellee's contention with reference to appellant's use of the ways in question. But appellant insists that the evidence shows that appellee's right of action is barred by the statute of limitations. There is evidence from which the jury may have found that any adverse claim made by appellant to the real estate in question, of which appellee had notice, was within the fifteen years immediately preceding this action. Under these circumstances we cannot sustain appellant's contention in this regard. 32 Cyc 1344; *Pleasants v. Blodgett* (1894), 39 Neb.

741, 58 N. W. 423, 42 Am. St. 624; *O'Neill v. Wilcox* (1901), 115 Ia. 15, 87 N. W. 742. There appears to be some evidence to sustain the verdict on every material issue involved, and we find no ground for holding that it is contrary to law.

Appellant contends that the court erred in the admission of certain evidence. In order for any such error to be available on appeal, it is necessary

10. that the objecting party state to the trial court, at the time the evidence is offered, the specific objection on which he relies for its exclusion, and only such objection so stated will be considered on appeal. Appellant's brief does not disclose a compliance with this rule in the court below, and hence there is no question presented for our determination in regard to the admission of evidence. *Decker v. Mahoney* (1917), 64 Ind. App. 500, 116 N. E. 57, and authorities there cited.

Appellant states in his motion for a new trial that the court erred in permitting counsel for appellee to make certain statements in his argument to

11. the jury, but has failed to state in his brief any proposition or point with reference to the same, as required by clause 5 of Rule 22, governing the preparation of briefs. It has been repeatedly held that a failure to properly present an alleged error waives the same, and hence no question is presented as to the alleged misconduct of counsel. *Duffy v. England* (1911), 176 Ind. 575, 96 N. E. 704; *Moore v. Ohl, supra*; *Evansville, etc., R. Co. v. Hoffman, supra*.

We find no available error in the record. Judgment affirmed.

Hottel, J., not participating.

NOTE.—Reported in 121 N. E. 84.

TOWN OF BLOOMFIELD v. WEST ET AL.

[No. 9,615. Filed November 26, 1918.]

1. **APPEAL.**—*Questions Reviewable.*—*Briefs.*—*Sufficiency.*—On an appeal from a judgment for damages against an incorporated town for alleged wrongful destruction of property, where the transcript of the evidence covered 280 pages of the record, but appellant's brief set out only an ordinance involved and notice to plaintiffs to remove the property, a copy of the deed to plaintiffs for the property in controversy, and a condensed recital in six lines of the testimony of the town marshal, who destroyed the property on the order of the town board of trustees, the presentation of the evidence was insufficient under Rule 22 of the Appellate Court governing the preparation of briefs, so that questions, the determination of which require a review of the evidence, cannot be considered. p. 570.
2. **MUNICIPAL CORPORATIONS.**—*Nuisances.*—*Powers of City.*—A municipal corporation, although empowered by law to declare what shall constitute a nuisance, may not declare that to be one which in part is not. p. 573.
3. **EVIDENCE.**—*Judicial Notice.*—*Nuisances.*—*Frame Barn.*—It is a matter of judicial knowledge that a frame barn or similar structure, lawfully and properly erected and maintained on private property in a reasonably safe condition, cannot, in and of itself, be a public nuisance. p. 573.
4. **MUNICIPAL CORPORATIONS.**—*Public Nuisances.*—*Wrongful Use of Property.*—*Abatement.*—*Powers of City.*—The use or condition of a frame barn or similar structure may become objectionable, so that action may be taken by a municipal corporation to abate or remove the nuisance thus created, but such power must not be exercised to a degree greater than is necessary to preserve the public interest. p. 573.
5. **MUNICIPAL CORPORATIONS.**—*Nuisances.*—*Wrongful Use of Property.*—*Abatement.*—*Powers of City.*—If a nuisance arises out of the improper use of a building and is not inherent in the structure, the municipal corporation may regulate the use, but it cannot order a destruction of the building; and, if the offense is inherent in the structure, a demolition thereof may not be resorted to, if, prior to the exercise of municipal authority, the objectionable features have been eliminated. p. 574.
6. **APPEAL.**—*Review.*—*Harmless Error.*—*Repetition of Instruction.*—The single repetition of a correct proposition of law in the

course of nearly thirty instructions does not constitute reversible error, even though not good practice. p. 574.

7. **APPEAL.**—*Review.*—*Harmless Error.*—*Instructions.*—In an action against a municipal corporation for the wrongful destruction of a building, defendant cannot complain of an instruction failing to point out the effect of a private abatement of a nuisance which is about to become the object of municipal action, since the omission, if error, operated in its favor. p. 574.

From Monroe Circuit Court; *Robert W. Miers*, Judge.

Action by Mary B. West and another against the town of Bloomfield. From a judgment for plaintiffs, the defendant appeals. *Affirmed.*

Webster V. Moffett and *Allen G. Pate*, for appellant.

Slinkard & Vosloh and *William L. Cavins*, for appellee.

HOTTEL, J.—Appellees are the owners of a certain lot in the town of Bloomfield on which, prior to the year 1910, there was maintained a frame structure which, for some years, had been used as a livery barn. On November 15, 1909, the town board of trustees duly and regularly adopted an ordinance which provided "that it shall be unlawful to erect, construct, or suffer to remain standing, any building or structure that will be or has become unsafe for occupancy, or dangerous or detrimental to life, health, or safety to property within the corporate boundaries of said town of Bloomfield. Any such building or structure is hereby declared to be and to constitute a nuisance and shall be abated by demolition and removal by the town marshal on the order of said board of trustees," after the giving of certain prescribed notice to the owner. In December, 1909, the board of trustees, by

resolution, declared that, "owing to its unsafe and unsanitary condition," appellees' barn constituted a public nuisance in violation of the above ordinance, and directed its removal. Notice was subsequently served on appellees that the structure should be removed on or before June 11, 1910, but this order was not complied with, and, in August following, the town marshal, acting under the direction of the board of trustees, entered on appellees' premises and demolished the building in question.

Appellees subsequently instituted this action to recover damages for the alleged wrongful destruction of their property, and, from a judgment in their favor, this appeal is prosecuted. The sole error assigned challenges the action of the circuit court in overruling appellant's motion for a new trial.

The transcript of the evidence in this case covers 280 pages of the record, but in the preparation of its brief appellant sets out only a copy of the docu-

1. mentary proof showing the passage of the ordinance above quoted and the notice to appellees, a copy of the deed of the property in question to appellees, and a condensed recital in six lines of the testimony of the town marshal, who carried out the order of the board of trustees. This is clearly an insufficient presentation of the evidence under the requirements of Rule 22, and that fact is now relied on by appellee as showing a waiver of most of the grounds in appellant's motion for a new trial. A review of the evidence, or of portions thereof, would be essential to our consideration of appellant's contentions: (1) That the verdict is not sustained by sufficient evidence; (2) that the damages are excessive; (3) that the court erred in refusing appellant's

request for a peremptory instruction in its favor and in refusing its tendered instructions Nos. 1, 2, 3 and 4; and (4) that the court erred in certain rulings on the admission and exclusion of evidence, but, under many decisions of this and the Supreme Court, we are now precluded from considering any of the above contentions. *Meno v. State* (1917), 186 Ind. 4, 114 N. E. 689, 690; *Goshen Milling Co. v. Bailey* (1917), 186 Ind. 377, 114 N. E. 869, 871; *Adolph Kempner Co. v. Citizens Bank, etc.* (1917), 64 Ind. App. 632, 116 N. E. 440, 443; *Johnson v. Bebout* (1915), 59 Ind. App. 159, 160, 108 N. E. 967.

The principal questions sought to be presented, however, arise out of the action of the trial court in giving to the jury instructions Nos. 7, 8, 9, 12, 14 and 15, and we proceed now to their consideration, with a view to determine whether, under any supposable state of the evidence, their giving was proper.

Instruction No. 8 reads as follows: "In this case it is claimed by the defendant that when it passed a resolution condemning the property of the plaintiffs as a public nuisance, that at that time the building described in the complaint was so kept and managed that it was a public nuisance, and it is claimed by the plaintiffs that after the passage of said resolution made by the defendant that the plaintiffs abandoned the use of the livery barn and for which it was then used. Now I instruct you that even if, at the time of the passage of said resolution, the building was so used that it was a public nuisance, and that in April afterward the plaintiffs abandoned the use thereof, which made it a public nuisance, and long before it was destroyed the manure and offal had been hauled away, and the pile of manure and dirt removed, and

the building was unoccupied, closed and locked, and was in a reasonably safe condition on the 3rd day of August, 1910, when the defendant, by its officers and employes, demolished said building, then I instruct you that the defendant, if you find such to be the facts in this case, under the evidence, had no right to demolish and destroy said building, and the act of destroying and demolishing the same by the defendant's town marshal and those employed by him was wrongful, and the plaintiffs, if they were the owners of said building, would be entitled to recover such damages as, under the evidence and instructions in this case, was done to said property by said defendant."

In attacking this instruction, and others which present various phases of the same issue, appellant does not question the rule that a municipal corporation is liable for the wrongful acts of its officers which are either expressly authorized by the governing body of the corporation or are done by such officers without special authority, but within the scope of their duties and employment, and are subsequently ratified by the municipality. 4 Dillon, Mun. Corp. (5th ed.) §1652, and cases there cited. The contention is made, however, that the pleadings and the evidence in this case show that the act of the town marshal was not wrongful, but was done under the express and proper direction of the board of trustees. Reliance is placed on the authorities which hold in substance that a town board of trustees has power to declare what constitutes a nuisance and to take such steps as are necessary and proper to prevent, abate and remove the same; and that an ordinance adopted by the board under such power, if within constitutional

limitations, cannot be attacked as unreasonable when invoked in the individual case. *Beiling v. City of Evansville* (1896), 144 Ind. 644, 648, 42 N. E. 621, 35 L. R. A. 272; *Skaggs v. City of Martinsville* (1895), 140 Ind. 476, 478, 39 N. E. 241, 33 L. R. A. 781, 49 Am. St. 209; *Steffy v. Town of Monroe City* (1893), 135 Ind. 466, 467, 35 N. E. 121, 41 Am. St. 436; §9005, cl. 4, Burns 1914, Acts 1905 p. 219, §31.

The rule announced in these authorities is too firmly established to require discussion in this opinion, but appellant, in its invocation of that rule, seems to lose sight of appellees' contention that the act of the town marshal did not constitute an abatement or removal of a nuisance, but was, in fact, a destruction of private property without just cause.

As stated in *City of Evansville v. Miller* (1897), 146 Ind. 613, 618, 45 N. E. 1054, 1056, 38 L. R. A. 161:

- "The rule is well settled that a municipal corporation, although empowered by law to declare what shall constitute a nuisance, may not declare that to be one which in fact is not."
2. We think it a matter of judicial knowledge that a frame barn, or similar structure, lawfully and properly erected and maintained on
 4. private property in a reasonably safe condition, cannot, in and of itself, be a public nuisance. *Baumgartner v. Hasty* (1885), 100 Ind. 575, 576, 50 Am. Rep. 830. The use or the condition of that structure, however, may become objectionable, and steps may then be taken to abate or remove the nuisance thus created, provided that such power is not exercised to a degree greater than is necessary to preserve the public interest. If the nuisance arises

out of the improper use of a building, and is not inherent in the structure, the municipal corpo-

5. ration may regulate the matter of use, but it has no right, in the exercise of its police or other power, to order a destruction of the building; and, if the offense is inherent in the structure, a demolition thereof may not be resorted to, if, prior to the exercise of municipal authority, the objectionable features have been eliminated by the property owner. *First Nat. Bank, etc. v. Sarlls* (1891), 129 Ind. 201, 206, 28 N. E. 434, 13 L. R. A. 481, 28 Am. St. 185; *Barclay v. Commonwealth* (1855), 25 Pa. St. 503, 505, 64 Am. Dec. 715; *Miller v. Burch* (1869), 32 Texas 208, 210, 5 Am. Rep. 242.

Under the authorities just cited, instructions Nos. 8, 9, 12, 14 and 15 are clearly correct in their enunciation of the law, and they may be sustained with-

6. out separate discussion. Instruction No. 15 is practically a repetition of instruction No. 8 and is further challenged on that ground, but the single repetition of a correct proposition of law in the course of nearly thirty instructions given does not constitute reversible error, even though not good practice. *Terry v. Davenport* (1908), 170 Ind. 74, 77, 83 N. E. 636; *Herbert v. Drew* (1869), 32 Ind. 364, 365.

Instruction No. 7 is incomplete, in that it fails to point out the effect of a private abatement of a nuisance which is about to become the object of

7. municipal action, but this omission, and the error, if any, which was occasioned thereby, operated in appellant's favor, and it may not now complain.

No other questions are properly presented, and a

Enterprise Fence, etc., Co. v. Majors—68 Ind. App. 575.

consideration of the entire record convinces us that substantial justice has been done. Judgment affirmed.

NOTE.—Reported in 121 N. E. 4. Municipal corporations: powers to prevent or abate nuisance, 36 L. R. A. 599; extent of power over buildings as nuisance, 38 L. R. A. 161. See under (2) 28 Cyc 715; (4) 28 Cyc 753.

ENTERPRISE FENCE AND FOUNDRY COMPANY v. MAJORS.

[No. 10,286. Filed November 26, 1918.]

1. MASTER AND SERVANT.—*Workmen's Compensation.—Refusal to Submit to Operation.—Right to Compensation.*—An injured employe seeking compensation under a workmen's compensation act must submit to an operation which will cure him when so advised by his attending physician, when not attended with danger to life or health or extraordinary suffering, and he cannot recover compensation for permanent impairment resulting from a refusal to submit to such an operation. p. 577.
2. MASTER AND SERVANT.—*Workmen's Compensation Act.—Refusal to Submit to Operation.—Right to Compensation.*—In a proceeding for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, for injury to a hand, applicant's refusal to permit the amputation of a finger was not such unreasonable or wilful misconduct as would prejudice the allowance of additional compensation, for permanent impairment of the hand, where the attending physician advised that the finger might be saved. p. 578.
3. MASTER AND SERVANT.—*Workmen's Compensation Act.—Agreement as to Compensation.—Modification.—Power of Industrial Board.*—Although the employer and an injured servant entered into an agreement as to compensation for the loss of the employe's finger, as provided for by §57, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, and the agreement was filed with, and approved by, the Industrial Board, the award could be modified and increased upon a showing that the employe's use of the hand had become permanently impaired because of infection after the agreed award, where such award was intended to pay only for the loss of the finger. p. 579.

From the Industrial Board of Indiana.

Proceedings for compensation under the Workmen's Compensation Act by Edward Majors against the Enterprise Fence and Foundry Company. From an award for applicant, the defendant appeals. *Affirmed.*

Orbison & Olive, for appellant.

W. L. Taylor, for appellee.

IBACH, J.—Appellee was injured on March 6, 1917, while in the employ of appellant, which injury consisted of a "twist and laceration of the index finger of the right hand." Appellant had actual knowledge of the injury when it was received, made its report of the same at that time, and filed it with the Industrial Board on March 14, 1917. On March 30, the parties agreed on the compensation which should be paid to appellee, which was \$6.81 a week during his total disability not to exceed 500 weeks, and the necessary and reasonable surgical, medical and hospital expenses occasioned by the injury during the first thirty days thereafter. This agreement was approved by the board on April 2, 1917. On April 19, appellee's injured finger was amputated at the middle joint. At that time the parties entered into a supplemental agreement pursuant to §57, Acts 1915 p. 392 (as amended, Acts 1917 p. 154), §80201 *et seq.* Burns' Supp. 1918, wherein appellant agreed to pay appellee for a period of fifteen weeks the sum of \$6.81 each week, which was fifty-five per cent. of his average weekly wage. This agreement was likewise filed with the Industrial Board, and approved by it on April 26, 1917. Appellant has fully paid the compensation provided for in such supplemental agreement.

On September 10, 1917, appellee filed a petition with the Industrial Board, which he terms his "Application for Adjustment," and in which he asks for a review of the agreed award of April 19, 1917. The material averments of his petition are that, as a result of his injury, the second and ring fingers of his right hand were left stiff and permanently injured. This petition was subsequently heard by the full board, and an award made granting to appellee 22½ weeks' compensation at the rate of \$6.81 per week, to be paid in cash in a lump sum. It is from this award that appellant appeals and contends: (1) That the Industrial Board had no legal power to make appellee an additional award after the agreement of April 19, 1917, which agreement was fully executed by the parties in settlement of his claim and in all respects in conformity with the rules of the board more than seven days after the accident and duly approved by the board, and that there was no change of condition so far as the extent of the injury was concerned subsequently to the execution of such agreement. (2) That appellee cannot recover compensation for a permanent injury to his hand, when said permanent injury was due to his refusal to permit the attending surgeon to perform a surgical operation not of itself dangerous or attended with extraordinary suffering, which, if it had been performed when it was advised, would have prevented infection and saved the permanent impairment now complained of.

We will first dispose of appellant's second contention. The law seems to be well settled that an injured employe seeking compensation must submit to

1. an operation which will cure him when so advised by his attending physician, when not

attended with danger to life or health or extraordinary suffering, and, if as a result of such refusal on his part he suffers a permanent impairment, the employer will not be required to compensate him for the resulting permanent impairment. 1 Honnold, Workmen's Compensation 525; *Jendrus v. Detroit Steel Products Co.* (1913), 178 Mich. 265, 144 N. W. 563, L. R. A. 1916A 381, Ann. Cas. 1915D 476.

There is evidence in this case, and the Industrial Board found: "That at the time of the injury the attending surgeon employed by appellant at

2. first advised the amputation of appellee's index finger; that appellee remonstrated and insisted that the finger should be saved if possible and, in response to the objection of appellee, the attending physician advised that he had saved fingers as badly injured as that of appellee, and it was agreed to make an effort to save the finger. The finger was not amputated at that time, but was treated for some period in an endeavor to save it; that infection developed which involved practically the whole of plaintiff's right hand, and made necessary the amputation of the index finger which was amputated at the middle joint * * *. That the infection developed because of the delay in the amputation; that the plaintiff's refusal to accept the amputation at the time of the injury was made in good faith with a view of saving the finger if possible; that his refusal was not wilful, stubborn or without reason." It would therefore seem to follow that appellee's insistence that his finger be saved if possible, when taken with the statement made by the surgeon, was not such unreasonable or wilful misconduct as would prejudice the allowance of additional compensation.

We are satisfied that the further contention of appellee has been determined by this court. *In re Stone* (1917), 66 Ind. App. 38, 117 N. E. 669. In that case it is said that when the Industrial Board has approved an agreement under the Workmen's Compensation Act, it still has jurisdiction of the subject-matter, even if the agreement was intended as a compromise settlement of all compensation, and may consider all dispute with reference to compensation to be paid at any time before the case is finally disposed of.

In this connection the Industrial Board has found, in addition to what we have already set out: "That on the 19th day of April, 1917, plaintiff and defendant entered into a supplemental compensation agreement providing for the payment of fifteen weeks' compensation at the rate of \$6.81 per week for the loss of the index finger of the right hand at the middle joint; that pursuant to said agreement the defendant had paid to plaintiff fifteen weeks' compensation at the rate of \$6.81 per week; that because of the amputation of the index finger at the middle joint, the adhesion of tendons, and the permanent stiffness especially in the middle and second fingers of the right hand, the natural use and function of the whole said hand has been permanently impaired."

It is clear, we think, that by the supplemental agreement appellant intended to and did pay for the loss of appellee's index finger as provided for

3. by said §57, §80201 *et seq.* Burns, *supra*. Nothing was allowed or paid for permanent or temporary partial disability thereafter, if any resulted to appellee's hand and other fingers. The evidence shows and the finding is that appellee's second and ring

fingers were "left stiff" owing to an infection, consequently a partial permanent injury resulted to such fingers, and no such injury was contemplated or considered in the agreed award of April 19, 1917. Such award was doubtless considered sufficient for the injuries as they then existed, but a change in such condition and an increase in appellee's disability were properly considered by the Industrial Board upon the petition filed by appellee, and there is no dispute in this appeal that appellee's petition was timely and properly filed. Under all the evidence, we are satisfied that the Industrial Board was justified in reaching the conclusion that appellee's second and ring fingers had become in part permanently impaired after the agreed award, and it was warranted in granting the award which is here appealed from.

Award affirmed.

NOTE.—Reported in 121 N. E. 6. See under (1) L. R. A. 1916A 387, 1917D 174.

BACHMAN ET AL. v. WATERMAN.

[No. 9,959. Filed November 26, 1918.]

1. MASTER AND SERVANT.—*Workmen's Compensation Act.—Injury Arising Out of and in Course of Employment.*—An injury is received in the course of the employment when it is suffered while the workman is doing what he was hired to do and it arises out of the employment when it appears that there is a causal connection between the environments of the employment and the resulting injury; and such causal connection is not indicated by the mere fact that a workman's employment required him to be at a certain place at a certain time, but it must also appear that the nature of his employment subjected him at such a place to a certain danger, although not foreseen, and that, by reason of being subjected to such danger, he was injured. p. 585.

2. **MASTER AND SERVANT.—*Workmen's Compensation Act.—Place of Employment.***—Under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, an employe's place of employment is sufficiently comprehensive to include all the territory that he is required to visit in performing the duties of his employment; and where such duties require him to travel public streets, the perils and hazards incident to travel thereon, such as danger from moving vehicles, become a part of the environment in which he is required to work. p. 585.
3. **MASTER AND SERVANT.—*Workmen's Compensation Act.—Place of Work.—Injury Arising Out of and in Course of Employment.***—Where it was necessary for a salesman to travel the public streets in the performance of his duties, his place of work included such streets as he was required to traverse while doing his work, and an injury received by being struck by an automobile while traversing a public street was an injury by accident arising out of and in the course of his employment, if at the time he was performing the duties of his employment. p. 586.
4. **MASTER AND SERVANT.—*Workmen's Compensation Act.—Injury.—Out of and in Course of Employment.—Evidence.***—Where a flour salesman, whose duty it was to solicit orders and telephone them to his employer from his home at the close of the day's work, was struck by an automobile while crossing a public street in the direction of a street car, which would have carried him to his home, and also toward the business establishment of a prospective customer, the accident occurring shortly before the time he usually arrived at his home, such facts were sufficient to warrant the inference that he was crossing the street either to board the street car to return home in order to telephone the day's orders to the employer's office or to solicit an order from the prospective customer, so that he was engaged in his duties at the time of the accident, and the injury was one arising out of and in the course of the employment. pp. 587, 588.
5. **MASTER AND SERVANT.—*Workmen's Compensation Act.—Appeal.—Review.—Presumptions.***—In a proceeding for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, it is the province of the Industrial Board to draw legitimate inferences from the facts proved, and on appeal it will be presumed that the board drew those permissible deductions of fact that are in harmony with and support the award. p. 587.

From the Industrial Board of Indiana.

Proceedings for compensation under the Workmen's Compensation Act by Mary E. Waterman

against Valentine Bachman and another. From an award for applicant, the defendants appeal. *Affirmed.*

Harvey & Austill and Joseph W. Hutchinson, for appellants.

Davis, Moore, Cooper, Royse & Bogart, for appellee.

CALDWELL, J.—Appellants Valentine Bachman and his insurance carrier challenge the sufficiency of the evidence to sustain the finding of facts. There was evidence to the following effect: Bachman operated a flour mill in Indianapolis. On and for two years prior to December 26, 1916, Lee F. Waterman was in his employ as a salesman. The duties of his employment required him to visit grocery stores and various other places of business in Indianapolis and the surrounding territory, for the purpose of taking orders for flour and other mill products, and also for the purpose of making collections for products theretofore sold and delivered. He had regular customers both within and without the city, on whom he was expected to call at stated intervals. It was also a part of his duty to visit others than regular customers and endeavor to take their orders for mill products.

The particular time at which he should call on his customers and prospective customers was left largely to his own judgment and convenience. On Mondays and Tuesdays he usually canvassed certain territory within the city; on other days, territory without the city. As a rule he traveled from place to place and from customer to customer in a small automobile owned and furnished by his employer. When for any reason the automobile could not be used, he

walked or rode on the street cars. On those days when he canvassed within the city, his custom was to phone his orders before six o'clock in the evening from his home to the mill office. This custom was understood by Bachman's bookkeeper, whose duty it was to receive such orders. The office closed at six o'clock. Waterman lived on East Sixteenth street. It required about twenty minutes to travel on the cars from the point where he was injured, as herein-after described, to his home. From such point he could have reached his home over either the Central avenue or the College avenue line.

On the afternoon of December 26, 1916, he visited a number of customers in the north central part of the city, taking orders and making collections. The automobile which he had been using was out of repair, and he therefore proceeded on foot. At 4:30 p. m. he visited Maloy's grocery on North Alabama street, taking an order and making a collection. He left Maloy's at about 4:50 and proceeded about two blocks to the intersection of Michigan and New Jersey streets with Massachusetts avenue. Michigan street extends east and west; New Jersey street, north and south; Massachusetts avenue, northeast and southwest. At about 4:55 p. m., Waterman reached a point on the northwest side of Massachusetts avenue immediately west of the intersection. He thereupon started southward across the avenue. A College avenue car, headed northeast towards his home, stood in Massachusetts avenue just west of the intersection, receiving and discharging passengers. On the southeast side of Massachusetts avenue is Lowe's grocery. Bachman's bookkeeper testified that she did not remember that any orders had ever been received from

Lowe's, but that money had been received from there. There were a number of groceries in the vicinity of the intersection, the proprietors of which were possible customers. As Waterman proceeded across the avenue, he was going in the direction of the College avenue car, and also in the direction of Lowe's grocery. It was observed that he proceeded hurriedly, giving certain witnesses the impression that he was hastening to catch the car. His apparent haste, however, possibly may be accounted for by another circumstance: As he started across the avenue two automobiles were approaching from the northeast, the first at a rapid rate of speed, near the curb; the second following near the center of the avenue. It was apparently necessary for him to hasten to avoid being struck by the first automobile. As he hastened out from in front of it, he was struck by the second, near the front end of the College avenue car. As a consequence he suffered injuries from which he died in a few days. Appellee was his dependent wife, and is now his widow. He had not phoned to the mill office his orders for the day. Bachman's bookkeeper waited after closing time to receive such orders, but, by reason of the accident, no message conveying them was transmitted or received. Several days after the accident a book found on Waterman's person, containing the orders and an account of collections, was delivered at the office. There was evidence that Waterman, when canvassing in the city, always phoned his orders from his home, and that it was his custom to reach his home in time to perform that duty before the office closed at six o'clock. There was no direct evidence indicating his immediate purpose in crossing the avenue. Whether he was proceeding

to call on other customers, or prospective customers, rather than endeavoring to catch the car for the purpose of going home is left to inference.

Appellants contend that under the evidence it does not affirmatively appear that the accident which resulted in Waterman's death arose out of or in the course of his employment.

This court is committed to the following doctrines: That an injury is received in the course of the employment when it is suffered while the workman

1. is doing what he was hired to do; that it arises out of the employment when it appears that there is a causal connection between the environments of the employment and the resulting injury; that such causal connection is not indicated by the mere fact that a workman's employment required him to be at a certain place at a certain time, and while there he was injured, but it must appear also that the nature of his employment subjected him at such place to a certain danger, although not foreseen, and that, by reason of being subjected to such a danger, he was injured; that under the Workmen's Compensation Act an employe's place of employment is suffi-

2. ciently comprehensive to include all the territory that he is required to visit in performing the duties of his employment; that, where the duties of his employment require him to travel public streets, the perils and hazards incident to travel thereon, such as the danger of coming in contact with moving vehicles, become a part of the environment in which he is required to work. *In re Harraden* (1917), 66 Ind. App. 298, 118 N. E. 142; *In re Betts* (1918), 66 Ind. App. 484, 118 N. E. 551.

It was necessary for Waterman to travel the public

streets in doing the work which he was hired to do. It results that his place of work included such

3. public streets as he was required to and did traverse while doing such work. Since vehicles of conveyance also continuously pass to and fro along the public streets, the passage of such vehicles with the consequent peril became an ever-present incident of his employment, and constituted a part of the circumstances in the midst of which he was required to work. While traversing a public street he received his fatal injuries by coming in contact with such a vehicle. If at the time the duties of the day under his employment had not been completely performed, but on the contrary, he was still doing the work he was hired and expected to do, if in his employer's interest he was proceeding to call on a customer, or prospective customer, or if he was moving to wind up his day's work in a manner expressly or tacitly required and expected by his employer, then it follows that he was injured by an accident arising out of and in the course of his employment. See the following: *In re Harraden, supra*; *Beaudry v. Watkins* (1916), 191 Mich. 445, 158 N. W. 16, L. R. A. 1916F 576; *Globe Indemnity Co. v. Industrial Acc. Comm.* (1918), 36 Cal. App. 280, 171 Pac. 1088; *Putnam v. Murray* (1916), 174 App. Div. 720, 160 N. Y. Supp. 811; *Kunze v. Detroit, etc., Co.* (1916), 192 Mich. 435, 158 N. W. 851, L. R. A. 1917A 252; *Bett v. Hughes* (1914), 8 B. W. C. C. 362; *Pierce v. Provident, etc., Supply Co.* (1911), 4 B. W. C. C. 242; *M'Neice v. Singer, etc., Machine Co.* (1910), 4 B. W. C. C. 351; *Refuge Assurance Co. v. Millar* (1911), 5 B. W. C. C. 522.

Decedent completed his business with a customer

at about 4:50 p. m. Five minutes later he started across the avenue. His purpose in so doing,

4. and consequently his exact relation to his daytime duty of canvassing for orders, are somewhat uncertain. The circumstances would seem to be sufficient, however, to justify some deduction of fact. Since he was moving in the direction of a standing street car, which would have carried him to the vicinity of his home, had he embarked on it, perhaps it might reasonably be implied that such was his intention, and consequently that he had completed his canvassing for that day. But, assuming that the situation would justify such a deduction, if made by the proper tribunal, there is another equally or more reasonable. Thus about an hour yet remained before the time at which he usually arrived at his home. About twenty minutes were required to make the trip. While he was going in the direction of the standing car, he was going also in the direction of the place of business of a prospective customer, perhaps a customer, since money had been received from that place. Other prospective or possible customers were in the vicinity. Under the circumstances we believe the inference to be reasonable that he was

still engaged in the canvassing duties of the

5. day. It is the province of the board to draw legitimate inferences from facts proved. Of permissible deductions of fact, we must assume that the board drew those that are in harmony with and that support the award. See *Kunze v. Detroit, etc., Co., supra*.

Moreover, assume that Waterman had completed his canvassing for the day, and that it was his inten-

tion to board the street car for the purpose of

4. being carried to his home: He had taken a number of orders that day, as evidenced by memoranda found on his person after the accident. These orders had not yet been phoned in to the office of his employer. It was his custom, possibly for purposes of business privacy, to perform this duty after he arrived at home. It was also his custom to reach his home to that end, and that he might report his orders before the office closed at six o'clock. His employer knew of such custom, was satisfied with and relied on it, and at least tacitly required that it be followed. On such assumption it appears that, while Waterman had completed the more substantial labors of the day, a further duty to his employer and incident to the employment remained undischarged. He was injured while proceeding in the customary way to the performance of such duty. Under the facts this case is not governed by those decisions wherein it appears that a workman was injured while returning from or going to his place of work, the day's duties being completed or not yet commenced, but rather by that other line, wherein the day's service in its general scope being completed, there yet remains some other incidental duty, the workman being injured while performing it. In such cases it is held that the injury arises out of and in the course of the employment. Among cases that might be cited see the following: *Papinaw v. Grand Trunk R. Co.* (1915), 189 Mich. 441, 155 N. W. 545; *Duffield v. Peers* (1916), 32 D. L. R. 339; *City of Milwaukee v. Althoff* (1914), 156 Wis. 68, 145 N. W. 238, L. R. A. 1916A 327; *Matter of Grieb v. Hammerle* (1918), 222 N. Y. 382, 118 N. E. 805.

This court has held that an injury received by a switchman after he had completed his hours of active service, and while he was proceeding to perform the incidental duty of registering out, was suffered in the course of his employment. *Inland Steel Co. v. Lambert* (1917), 66 Ind. App. 246, 118 N. E. 162.

The Duffield case, *supra*, is to the effect that a sales agent, who, while delivering his employer's goods, traveled from place to place by means of a horse and conveyance provided by the employer, is acting within the scope of his employment when taking the horse to the stable after the completion of the day's work.

The evidence is sufficient to sustain the finding. Award affirmed, with five per cent. damages as provided by act of 1917. Acts 1917 p. 154, §8020q2 *et seq.* Burns' Supp. 1918.

NOTE.—Reported in 121 N. E. 8. See under (3, 4) L. R. A. 1916A 814, 1917D 114, 1918F 911.

WRIGHT, RECEIVER, v. COHN.

[No. 9,656. Filed November 27, 1918.]

1. **APPEAL.—Judgments Appealable.—Final Judgment.**—In an action on a note, an entry, "The court * * * now finds for the defendant to which ruling of the court the plaintiff excepts. It is therefore considered, adjudged and decreed by the court that the defendant do have and recover from plaintiff" all his costs, is a final judgment from which an appeal will lie, since, although incomplete in statement, it disposes of the entire controversy. p. 591.
2. **NEW TRIAL.—Grounds.**—Specifications in a motion for a new trial that the finding and judgment of the court is contrary to law, is not sustained by sufficient evidence, is contrary to the weight of the evidence, and is contrary to law and the evidence, are not grounds for a new trial authorized by statute. p. 592.

Wright, Rec., v. Cohn—68 Ind. App. 589.

3. **BILLS AND NOTES.—Promissory Note.—Explaining Contract.—Parol Evidence.—Admissibility.**—In an action on a promissory note, where defendant answered that he signed the note at the request of the payee bank's president as surety for him, and that there was an understanding between the parties that the note should not become binding until signed by the president, which was never done, a question asking defendant's brother what defendant and the president said about the note was not objectionable as seeking to vary or explain the terms of a written contract by parol. p. 592.

From Lake Superior Court; *Virgil S. Reiter*, Judge.

Action by William Wright, receiver of the Indiana Trust and Savings Bank, against Mike Cohn. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

L. V. Cravens, for appellant.

Gavit, Hall & Smith, for appellee.

FELT, J.—Appellant brought suit against appellee on a promissory note alleged to have been executed by appellee to the Indiana Trust and Savings Bank.

The complaint in one paragraph was answered by an answer in two paragraphs. The first paragraph was a verified denial of the execution of the note. In the second paragraph it was alleged in substance that appellee signed the note sued upon at the request of Charles E. Fowler, who was at the time president of said bank; that he signed the same as surety for said Fowler with an agreement and understanding by and between appellee, the bank, and said Fowler, that the note should not become a binding obligation on appellee until the same was executed by said Fowler as principal; that appellee signed the note as surety only, and no consideration whatever

moved to him on account thereof; that subsequently, without his knowledge or consent, the note was deposited in said bank as his obligation..

The issues were closed by a reply in general denial to each paragraph of the answer.

A trial by court resulted in a finding for the defendant as follows: "The court having had this cause under advisement since the 20th day of November, 1914, now finds for the defendant to which ruling of the court the plaintiff excepts. It is therefore considered, adjudged and decreed by the court that the defendant do have and recover of and from the plaintiff all his costs herein laid out and expended."

Appellant's motion for a new trial was overruled. The only assignment of error not expressly waived by appellant in his brief is the action of the court in overruling the motion for a new trial.

Appellee contends that no question is presented by the appeal because there is no final judgment from which an appeal will lie. Appellee's conten-

1. tion cannot be sustained. It has been held that no particular form of words is essential to the rendition of a final and appealable judgment. A judgment is final if it disposes of the entire controversy, settles the rights of the litigants, and leaves nothing for further consideration. The entry in this case, though somewhat incomplete in statement, in substance meets and satisfies the essentials of a final judgment. *State, ex rel. v. Long* (1907), 168 Ind. 553, 555, 80 N. E. 541; *Kelley v. Augsperger* (1908), 171 Ind. 155, 156, 85 N. E. 1004; *Baker v. Osborne* (1913), 55 Ind. App. 518, 104 N. E. 97; *O'Neil v. Hudson* (1915), 59 Ind. App. 541, 109 N. E. 792; *Leach v. Webb* (1916), 62 Ind. App. 693, 113 N. E. 311.

Appellant in his motion for a new trial has assigned as causes the following: “(1) The *finding* and *judgment* of the court is contrary to law. (2) The
2. *finding* and *judgment* of the court is not sustained by sufficient evidence. (3) The *finding* and *judgment* of the court is contrary to the weight of the evidence. (4) The *finding* and *judgment* of the court is contrary to law and the evidence.” Such statements are not grounds for a new trial authorized by the statute and have been held insufficient. *Bradford v. Wegg* (1914), 56 Ind. App. 39, 40, 102 N. E. 845, and cases cited; *Ferdinand R. Co. v. Bretz* (1915), 59 Ind. App. 123, 124, 108 N. E. 967.

The only other question presented by appellant arises under the ninth alleged cause for a new trial, relating to a question asked the witness Samuel J. Cohn by appellee’s counsel. He was in substance asked, What did your brother Mike say about any note and what did Mr. Fowler say to your brother on that subject? Appellant’s attorney objected on the ground that the question sought to explain a written contract by parol evidence, and that any statement made by Mr. Fowler would not bind the bank.

There is no suggestion in the question which warrants the objection that it sought to explain or vary the terms of a written contract. The issues

3. present the question whether there was in fact any valid obligation or contract binding upon the defendant. The information sought by the question was proper evidence under the issues as tending to prove the facts of the transaction out of which the controversy arose. How far, if at all, the bank was bound by what was said and done, is a question quite apart from the admissibility of the evidence. As

against any objection urged, the evidence was admissible.

No reversible error has been shown by appellant.

Judgment affirmed.

NOTE.—Reported in 121 N. E. 3.

TAYLOR v. CAPP ET AL.

[No. 9,657. Filed November 27, 1918.]

1. PLEADING.—*Demurrer.—Grounds.*—A variance between the allegations of the complaint and the instrument on which the action is founded is not a ground for demurrer, since the instrument controls, and such allegations will be disregarded. p. 599.
2. SALES.—*Buyer's Breach of Contract.—Seller's Remedies.*—Where there has been a breach of contract for the sale of personal property by the buyer, the seller may retain or store the property for the vendee and recover the entire purchase price, he may sell the property for and as the vendee's agent and recover the difference between the contract price and the resale price, or he may keep the property as his own and recover the difference between the contract price and the market price at the time and place of delivery. p. 599.
3. SALES.—*Buyer's Breach of Contract.—Seller's Remedies.—Condition Precedent.*—The seller's right, on the buyer's breach of a contract of sale of personal property, to retain the property as and for the buyer and sue for the purchase price, or sell the property as agent of the vendee and recover the difference between the contract price and the price obtained on resale, is dependent on whether the contract has been fully executed by him so far as execution is possible. p. 600.
4. SALES.—*Buyer's Breach of Contract.—Action.—Complaint.*—On the buyer's breach of contract for the sale of personalty, whether the seller retains the property and sues for the entire purchase price or sells the property as the buyer's agent and sues to recover the difference between the contract price and the price obtained on resale, the complaint must show that the vendor retained possession of the property for the vendee. p. 600.
5. SALES.—*Buyer's Breach of Contract.—Action.—Complaint.*—VOL. 68—88.

Where the seller, after a breach of contract of sale of personal property, sues for the difference between the contract price and the price obtained on resale, averments in the complaint must show that he retained possession for the vendee and that the sale of the property by the seller was as agent for the buyer after proper notice of intention to sell. p. 600.

6. **SALES.—Buyer's Breach of Contract.—Retention of Property by Seller.—Damages.**—Where the seller, on the buyer's breach of the contract of sale, retains the property as his own, it is immaterial whether he keeps or sells it, since the damages in such a case are those actually sustained, which ordinarily is the difference between the contract price and the market value of the property at the time and place of delivery. p. 601.
7. **SALES.—Breach of Contract by Buyer.—Action.—Complaint.**—Where, after a buyer's breach of the sale contract, the seller keeps the property as his own and sues to recover the difference between the contract price and the market price at the time and place of delivery, the complaint is sufficient though not alleging the market value at the time and place of delivery, where it contains a general averment that plaintiff was damaged in a specific amount. pp. 601, 603.
8. **SALES.—Buyer's Breach of Contract.—Action.—Damages.—Proof.**—Where, after a breach of contract for the sale of personal property, the seller retains the property and sues to recover the difference between the contract price and the market price at the time and place of delivery, if there is no such market value the seller's damages may be otherwise established, and proof of sales of similar property within a reasonable time, and at places reasonably convenient and accessible, may be considered in determining such value, but the mere absence of an immediate demand for the property sold, at the time and place of delivery, would not establish the want of a market value. p. 602.
9. **SALES.—Buyer's Breach of Contract.—Damages.—Proof.**—The mere fact that a quarantine prevents the offering of live stock on the market does not establish the want of market value. p. 603.
10. **SALES.—Breach of Contract.—Action.—Special Damages.—Pleading.**—In an action for breach of a sales contract, if special damages are relied on, the facts on which they are based must be specifically pleaded, as only those damages which would usually flow from the breach of such a contract are provable under a general averment of damages sustained. p. 603.
11. **SALES.—Breach of Contract.—Action by Seller.—Complaint.—Sufficiency.**—In an action for breach of contract of sale, paragraph of complaint held sufficient to state a cause of action to recover

Taylor v. Capp—68 Ind. App. 593.

of the vendee the difference between the contract price and the price obtained on resale. p. 603.

12. PLEADING.—*Construction.*—*Inferences.*—A fact reasonably inferable from facts directly averred will be given the same force as if directly stated. pp. 604, 605.

13. SALES.—*Breach of Contract.*—*Action by Seller.*—*Complaint.*—*Sufficiency.*—In a seller's action for breach of the contract of sale of personal property, a complaint seeking recovery of the difference between the contract price and the price obtained on resale is fatally defective where it fails to allege that the seller retained possession of the goods for the buyers after the breach of the contract and that he sold the goods as their agent after due notice to them of his intention to sell. p. 604.

14. PLEADING.—*Complaint.*—*Theory.*—A complaint must proceed upon some definite theory, which must be determined from its general scope and tenor. p. 605.

From DeKalb Circuit Court; *Dan M. Link*, Judge.

Action by Jonathan E. Taylor against Charles Capp and another. From a judgment for defendants, the plaintiff appeals. *Reversed.*

Dudley W. Gleason, for appellant.

W. P. Endicott and *Harold K. Tess*, for appellees.

BATMAN, J.—This is an action by appellant against appellees to recover damages alleged to have been sustained by reason of the breach of a certain contract for the sale of cattle. The complaint is in three paragraphs. The first alleges in substance that on September 21, 1914, appellant entered into a contract with appellees whereby he sold them certain cattle, which were to be delivered on November 1, 1914; that appellees paid appellant thereon the sum of \$100, and agreed to pay the remainder of the purchase price at the time of their delivery; that prior to the time for delivering said cattle appellees informed appellant that they did not know just when they could attend and receive the same, and pay the balance of the pur-

chase price therefor; that appellant, on November 1, 1914, and for a long time thereafter, was ready, willing and able to deliver said cattle to appellees in pursuance of said contract, and to perform all the conditions thereof to be performed by him, and then and there demanded of appellees that they attend and receive said cattle, and pay the balance due therefor, all of which they refused to do; that by reason of the premises he was damaged in the sum of \$500.

The second paragraph contains the same allegations as the first, and in addition thereto the following: That at the time said contract was entered into appellant was the owner of said cattle, and had some of them in his pasture lot in the State of Michigan, and the remainder thereof in his pasture lot in the State of Indiana, where appellees inspected the same, and where they were kept by appellant until the time for their delivery; that on the first and second days of November, 1914, he was the owner of said cattle, and on said days was able, ready and willing to deliver the same to appellees, and requested them to attend and receive the same, which they neglected and refused to do; that for a long time thereafter he held said cattle and requested appellees to attend and receive the same, which they refused to do; that if appellees had received said cattle and paid for them, as provided in said contract, he would have received the sum of \$3,500 therefor; that on November 3, 1914, a quarantine was placed upon the States of Indiana and Michigan, which prevented him from moving said cattle from his said pasture lots; that appellant and appellees had been expecting said quarantine for a long time prior to said breach of the contract in suit; that during the time of said quarantine the weather

was very bad, and said cattle shrunk in weight, and appellant was put to great expense in feeding and caring for the same; that said cattle were retained by him for appellees with their knowledge for a long time; that, by reason of said quarantine, the cattle market was much lower from November 1, 1914, to January 1, 1915, than the price he was to receive for said cattle, under the terms of said contract; that for a long time after said breach there was no market at all therefor; that, after holding them for seven weeks after November 1, 1914, and notifying appellees that he would resell the same, unless they should attend and receive them, he did resell said cattle at the first opportunity to different persons, receiving the highest market price therefor, to wit, \$2,900, which was much less than the contract price; that the deficiency arising from said resale, and the cost of feeding and caring for said cattle, amounted to \$800, no part of which has been paid by appellees; and that by reason of the premises he has been damaged in said sum.

The third paragraph contains the same allegations as the first, and in addition thereto the following: That at the time said contract was entered into the plaintiff was the owner of said cattle, and had some of them in his pasture lot in the State of Michigan, and the balance of them in his pasture lot in the State of Indiana, where the defendants inspected the same before and at the time of making said contract; that said cattle were kept by him in said pasture lots continuously until the time for the delivery thereof to the defendants; that on November 1, 1914, which was on Sunday, and on November 2, 1914, he was still the owner of said cattle, which were still in said pasture lots as aforesaid, and that on said days, and during

all parts thereof, he was ready, able and willing to deliver said cattle to defendants, and requested them to attend and receive the same, and pay the remainder of the purchase price therefor, all of which they neglected and refused to do; that immediately after the failure and refusal of appellees to accept said cattle and pay for the same, as aforesaid, and before appellant had an opportunity to make sale thereof in the market, or to any other person or persons, the market for said cattle greatly declined, so that the market price therefor was not more than one-half of that which appellees had agreed to pay for the same; that said decline in the market was caused largely by the fact that the government of the United States at that time ordered and declared a quarantine upon shipping and moving cattle from Michigan and Indiana into other states; that long before said quarantine was so declared, and long before the time for the delivery of said cattle, appellees had full notice and knowledge that such quarantine was likely to be so declared; that, being unable to sell said cattle after the failure of appellees to receive the same as aforesaid, except at said greatly reduced price, he retained the same, and fed and cared for them until the — day of January, 1915, when he sold the same for \$2,900, which was the highest and best price he was able to obtain therefor at any time after appellees' failure to receive the same as aforesaid; that while holding said cattle and endeavoring to sell the same, as aforesaid, he was required to expend and did expend the sum of \$400 in feeding them; that during said time the weather was bad, and, by reason thereof and without fault on his part, said cattle shrunk greatly in weight; that if appellees had received said cattle and

paid therefor, as provided in said contract, he would have received \$3,500 for the same; and that by reason of the premises he has sustained damages in the sum of \$1,000.

The contract in suit was made a part of each paragraph of complaint as an exhibit. Appellees filed a demurrer to the first paragraph of the complaint for want of facts, and also a like demurrer to the second and third paragraphs thereof. These demurrers were each sustained, and appellant refused to plead further. Judgment was thereupon rendered in favor of appellees for costs. Appellant has assigned the action of the court in sustaining said demurrers as the sole errors on which he relies for reversal.

It is claimed with reference to the first paragraph of complaint that the written contract filed therewith as an exhibit is at variance with the description

1 of the same as set forth in the body of said paragraph. Where there is a variance between the allegations of the complaint and the instrument on which the action is founded, the provisions of the instrument control, and such allegations will be disregarded. *Indiana, etc., Assn. v. Plank* (1898), 152 Ind. 197, 52 N. E. 991. Such a variance, therefore, would not be a ground for demurrer.

As preliminary to a further consideration of the sufficiency of the several paragraphs of the complaint, it may be well to note that, where there has

2. been a breach of contract for the sale of personal property, three remedies are available to the vendor, viz.: (1) He may retain or store the property as and for the vendee, and sue such vendee on the contract for the entire purchase price. (2) He may sell the property for and as the agent of the

vendee, and apply the proceeds on his (the vendor's) account against the vendee, and recover of the vendee the difference between the contract price and the price obtained on such resale. (3) He may keep the property as his own and recover the difference between the contract price and the market price at the time and place of delivery. The vendor's right

3. to pursue either of the first two remedies, above indicated, is dependent on whether the contract has been fully executed by him in so far as complete execution is possible by him; that is to say, the vendor's right to choose either of such remedies depends on whether he has done and performed all that was necessary to be done and performed by him under the contract, including all the acts necessary to place title and constructive possession in the vendee.

While the vendor, in choosing either of such remedies, may retain actual possession of the prop-

4. erty involved, and, by choosing the second remedy, may also sell such property, yet the averments in the complaint in either of such

5. cases must be such as to show that the vendor retained such possession for the vendee; and where the second remedy, *supra*, is chosen, the facts pleaded must also show that the sale of the property was for and as the agent of the vendee, and that such sale was preceded by proper notice of intention to sell. *Pillsbury, etc., Co. v. Walsh* (1915), 60 Ind. App. 76, 110 N. E. 96, and cases there cited.

It is obvious that the first paragraph of complaint does not seek to recover the contract price of the cattle sold, nor does it allege that he retained possession of the same for appellees, after the alleged breach of the contract, or that he sold them as their

agent, after due notice. It is therefore not good as an attempt to enforce either the first or second remedies stated *supra*.

But it remains to be determined whether said first paragraph states facts sufficient to constitute a cause of action, when considered as an effort to en-

6. force the third remedy stated *supra*. This remedy, unlike the other two, contemplates that title to the property, covered by the breached contract sued on, remains in the vendor, or at least is not transferred to the vendee under such contract, and in such case, after the vendee's refusal to carry out the contract and pay for such goods, and after the time of performance has passed, it is wholly immaterial whether the vendor keeps or sells the property so retained, or at what price he sells, if he sells, because the rule of damages in such cases is the actual injury or damages sustained, which ordinarily is the difference between the contract price and the market value of the property at the time and place of delivery. *Pillsbury, etc., Co. v. Walsh, supra*. But appellees contend in effect that the first para-

7. graph of the complaint is insufficient, when considered as an effort to enforce said third remedy, for the reason that the market value of the cattle at the time and place of delivery is not alleged. There are expressions in some former decisions of this court which tend to support this contention. *Ridgley v. Mooney* (1896), 16 Ind. App. 362, 45 N. E. 348; *Dill v. Mumford* (1898), 19 Ind. App. 609, 49 N. E. 861. There are, however, other cases in this state that hold, by implication at least, that such an allegation is not necessary, where the complaint contains a general averment that the plaintiff was damaged in a

specific amount on account of the breach of the contract sued on, and that under such general averment the plaintiff will be permitted to prove any damages which would usually and ordinarily flow from the breach of a contract of the character on which the action is predicated. *Wolf v. Schofield* (1871), 38 Ind. 175; *Lindley v. Dempsey* (1873), 45 Ind. 246; *Hadley v. Prather* (1878), 64 Ind. 137; *Dwiggins v. Clark* (1884), 94 Ind. 49, 48 Am. Rep. 140; *Richter v. Meyers* (1892), 5 Ind. App. 33, 31 N. E. 582; *Shipp v. Atkinson* (1893), 8 Ind. App. 505, 36 N. E. 375; *Pillsbury, etc., Co. v. Walsh, supra*. This also appears to be the rule in other jurisdictions. 35 Cyc 587; 19 Ency. Pl. and Pr. 66; *Peters v. Cooper* (1893), 95 Mich. 191, 54 N. W. 694. Inasmuch as it appears to be a reasonable rule, unattended by any hardship on the defendant, we are of the opinion that it ought to be expressly affirmed, and any case to the contrary ought to be overruled in that regard. The adoption and maintenance of this rule would not relieve a plaintiff from establishing his damages in accord with the law as indicated, which, under a complaint to enforce said third remedy, would ordinarily require proof of the market price of the property sold at the time and place of its delivery. If

8. there was no market price at such time and place, the damages sustained may be otherwise established. *Indiana Canning Co. v. Priest* (1896), 16 Ind. App. 445, 45 N. E. 618; 24 Am. and Eng. Ency. Law 1116. But the fact that the market price was unusually low by reason of existing conditions would not authorize a departure from the general rule. *Dwiggins v. Clark, supra*. The mere absence of an immediate demand for the property sold, at

the time and place provided in the contract for its delivery, would not establish the want of a market value, but sales made of similar property within a reasonable time, and at places reasonably convenient and accessible, may be considered in determining such value. 35 Cyc 594; *Dwiggins v. Clark, supra*; *Redhead Bros. v. Wyoming, etc., Investment Co.* (1905), 126 Iowa 410, 102 N. W.

144. It is likewise true that the mere fact of a

9. quarantine which prevents the moving of live stock and offering the same on the market would not of itself establish the want of market value. However, if special damages are relied on, the facts on which they are based must be specially pleaded, as only those damages which would usually and ordinarily flow from the breach of such a contract are provable under a general averment. In the instant case the first paragraph of complaint contains a general averment that the plaintiff was damaged in a specific amount by reason of the alleged breach of the contract, and therefore, under the rule announced, is sufficient to state a cause of action, when considered as an effort to enforce said third remedy, without the allegation for which appellees contend.
10. 7. ages which would usually and ordinarily flow from the breach of such a contract are provable under a general averment. In the instant case the first paragraph of complaint contains a general averment that the plaintiff was damaged in a specific amount by reason of the alleged breach of the contract, and therefore, under the rule announced, is sufficient to state a cause of action, when considered as an effort to enforce said third remedy, without the allegation for which appellees contend.

It will be observed that the second paragraph of the complaint not only alleges a breach of the contract of sale by appellees, but also alleges:

11. "That for a long time thereafter said plaintiff held the said cattle, and requested the said defendants to attend and receive the said cattle, which defendants refused to do. * * * That said cattle were retained by plaintiff for the defendants for a long time, all of which the defendants had notice.

* * * That after holding the said cattle for seven weeks after the first day of November, 1914, and at the first opportunity he had to sell the same, and after notifying the defendants that he would resell said cattle, unless they attended and received the same, this plaintiff did sell said cattle to different persons, receiving the very highest price therefor. Twenty-nine Hundred Dollars, which the market would afford, which was much less than the contract price." It is further alleged that the deficiency arising from said resale amounted to \$400; that the expense incident to said resale, including feeding and caring for said cattle, amounted to \$400; and that no part thereof has been paid. Demand for \$800 damages. These allegations give character to said second paragraph of the complaint, and make it clearly apparent that appellant is thereby attempting to enforce the second remedy stated *supra*. It contains by direct averments all the special facts necessary to state a cause of action on such theory, except that he made sale of the cattle for and as the agent of appellees, but

12. we believe this fact may be reasonably inferred from the facts directly averred. It will therefore be given the same force as if directly stated. *Domestic Block Coal Co. v. DeArmey* (1913), 179 Ind. 592, 100 N. E. 675, 102 N. E. 99. For the reasons indicated, we conclude that the court erred in sustaining appellees' demurrer to the second paragraph of the complaint.

An inspection of the third paragraph of the complaint discloses that it contains not only the same allegations as the first paragraph, relating to

13. the execution of the contract in suit and breach thereof by appellees, but also certain allega-

tions with reference to keeping the cattle after such breach and the cost of feeding the same, the decline in the market price and the cause thereof, the time at which they were sold, and the amount received therefor, the amount appellant would have received for the same had the contract not been breached by appellees, and the total loss sustained thereby. It will be observed that the total loss is not based on the difference between the market price and the contract price, but on the difference between the selling price and the contract price, augmented by the amount alleged to have been expended in feeding the cattle after the alleged breach. It is well settled that

14. a complaint must proceed upon some definite theory, and that theory must be determined by its general scope and tenor. *Grand Trunk,*

13. *etc., R. Co. v. Thrift Trust Co.* (1918), 68 Ind. App. 198, 115 N. E. 685, 116 N. E. 756. Applying this rule to the facts alleged, it is clearly apparent that appellant, by said third paragraph of complaint, is seeking to enforce said second remedy stated *supra*. However, it is fatally defective in failing to allege that appellant retained possession of the cattle for appellees after the breach of the contract, or that he sold them as their agent after due notice to them of his intention so to do. *Pillsbury, etc., Co. v. Walsh, supra*. The court therefore did not err in sustaining appellee's demurrer to said third paragraph of complaint.

For the reasons stated, the judgment is reversed, with instructions to overrule appellee's demurrer to the first and second paragraphs of the complaint, to grant appellant leave to amend his third paragraph

J. I. Case Threshing Mach. Co. v. Hufford—68 Ind. App. 606.

of complaint, and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 121 N. E. 37. Sales: effect of resale of property in fixing damages on refusal of purchaser to accept goods, 42 L. R. A. (N. S.) 670. See under (2-6) 35 Cyc 520, 525, 531, 583, 592.

J. I. CASE THRESHING MACHINE COMPANY v. HUFFORD
ET AL.

[No. 9,572. Filed November 27, 1918.]

1. **APPEAL.—Briefs.—Abstract Propositions of Law.**—Where appellant's motion for a new trial contains a large number of causes as grounds therefor, and in its brief, under "Points and Propositions," and under the heading of "Ruling on Motion for New Trial," appellant has set out a number of abstract propositions of law, none of which are applied to any specific cause for new trial, no question arising on the ruling on the motion is presented for review. p. 608.
2. **APPEAL.—Briefs.—Waiver of Error.—Failure to Cite Authorities.**—Where appellant's brief, under its propositions and points, contains but the bare statement of an alleged error, without any excuse for not supplying authority in its support, the error is waived. p. 608.
3. **APPEAL.—Review.—Ruling on Motion to Modify Judgment.**—Since the correctness of the ruling on a motion to modify the judgment necessarily depends upon the evidence, and the trial court's decision is not attacked by the motion for a new trial, either upon the ground that it is not sustained by sufficient evidence or that it is contrary to law, it will be assumed on appeal that the evidence is sufficient to warrant the ruling on the motion to modify. p. 608.

From Clinton Circuit Court; *Joseph Combs*, Judge.

Action by the J. I. Case Threshing Machine Company against John Hufford and another in which the defendants counterclaimed. From the judgment rendered, the plaintiff appeals. *Affirmed.*

J. I. Case Threshing Mach. Co. v. Hufford—88 Ind. App. 606.

Earl R. Gruber and Harry C. Sheridan, for appellant.

Kent & Ryan and Russel P. Harker; for appellees.

IBACH, J.—Appellant sued appellees to recover on certain notes executed by them and to foreclose a mortgage given to secure them.

At the outset it is contended by appellees that no question is presented by appellant's brief, for reasons, among others, that the points and authorities are not directed to any particular point or ruling of the trial court; "that there is no disclosed connection between the points stated and the specific causes for a new trial alleged."

The controlling issues were presented by a complaint and counterclaim, with denials thereto. The court, in a trial without a jury, found in favor of appellant on its complaint, and in favor of appellees on the counterclaim, and judgment was rendered accordingly. On motion the judgment was afterwards modified with respect to attorney fees, but the court refused to modify it so as to increase the general recovery.

The following errors are assigned and relied on for reversal: (1) The court erred in overruling the motion of appellant to change and modify the judgment so as to increase the same by the sum of \$115. (2) The court erred in overruling the motion of appellant to change and modify the judgment. (3) The court erred in overruling the motion of appellant for a new trial.

Appellant's motion for a new trial contains more than twenty separate rulings or causes. In its brief,

J. I. Case Threshing Mach. Co. v. Hufford—68 Ind. App. 606.

under "Points and Propositions," and under

1. the heading of "Ruling on Motion for New Trial," appellant has set out ten abstract propositions of law, none of which disclose any connection with any specific cause for new trial. Under the rules as construed by this and the Supreme Court no question is presented. *Leach v. State* (1912), 177 Ind. 234, 97 N. E. 792; *Reed, Exrx., v. Farmers Bank, etc.* (1918), 67 Ind. App. 425, 119 N. E. 261.

It is further insisted that no question is presented upon the motion to modify the judgment, as no authority is cited in support of the proposition.

2. Appellant's brief, under its points and propositions, contains but a bare statement of the alleged error, without any excuse for not supplying any authority in its support. It has been held that this is not sufficient to avoid a waiver of the question. *Wysor Land Co. v. Jones* (1900), 24 Ind. App. 451, 56 N. E. 46; *Wilson v. Nat. Fowler Bank* (1911), 47 Ind. App. 689, 691, 91 N. E. 269.

Furthermore, the record discloses that the decision of the court is not attacked by appellant's motion for a new trial, either upon the ground that it is

3. not sustained by sufficient evidence, or that it is contrary to law. The correctness of the ruling on the motion to modify would necessarily depend upon the evidence, and, indulging in the presumption in favor of the ruling of the trial court, we must assume that the evidence was sufficient. In any event we would be precluded from reversing upon any error not affecting the substantial rights of the appellant.

As supporting our conclusion, see *Switow v. Dustman* (1915), 183 Ind. 625, 109 N. E. 745; *Indianapolis,*

Public Savings Ins. Co. v. Greenwald—68 Ind. App. 609.

etc., *R. Co. v. Sample* (1915), 58 Ind. App. 461, 108 N. E. 400; *Sovereign Camp, etc. v. Latham* (1915), 59 Ind. App. 290, 107 N. E. 749; *Camp v. Camp* (1913), 52 Ind. App. 250, 100 N. E. 478; *Daniels v. Bruce* (1911), 176 Ind. 151, 95 N. E. 569; *Illyes v. White River Light, etc., Co.* (1911), 175 Ind. 118, 93 N. E. 670.

Appeal dismissed.

NOTE.—Reported in 121 N. E. 2.

PUBLIC SAVINGS INSURANCE COMPANY OF AMERICA v. GREENWALD.

[No. 9,463. Filed January 30, 1918. Rehearing denied November 27, 1918.]

1. **PRINCIPAL AND AGENT.—Unauthorized Acts of Agent.—Ratification.—Effect.**—A principal may ratify the unauthorized acts of his agent, and, when so ratified, such acts become as binding upon the principal as they would have been had such agent been duly authorized in the first instance. p. 614.
2. **APPEAL.—Review.—Evidence.—Sufficiency.**—If there is any evidence to sustain the trial court's finding, it is sufficient on appeal, although such evidence may be strongly contradicted and not entirely satisfactory. p. 615.
3. **APPEAL.—Evidence.—Sufficiency.—Scope of Review.**—In determining whether there is any evidence to support the finding of the trial court, the court on appeal must consider not only that which may be said to be direct, but, also all reasonable inferences which the trial court may have drawn. p. 615.
4. **PRINCIPAL AND AGENT.—Unauthorized Acts of Agent.—Ratification.—Evidence.**—In an action on an alleged account stated, wherein defendant contended that its agent had no authority to make the settlement in controversy, evidence held to justify the inference that defendant had full knowledge of the settlement soon after it was made. pp. 615, 617.
5. **EVIDENCE.—Failure to Produce Favorable Witness.—Presumption.**—Where a person has it within his power to produce a wit-

- ness, presumably favorably disposed toward him, to explain a transaction, and fails to do so, the presumption is that the testimony, if produced, would be unfavorable to him. p. 617.
6. **PRINCIPAL AND AGENT.—Ratification.—Scope.**—A principal who adopts the act of one professing to act for him must adopt it *in toto*, and will not be permitted to claim the benefit arising therefrom, and at the same time repudiate the burden thereof. p. 617.
7. **ACCOUNT STATED.—Requisites.—Partial Settlement.**—It is not necessary that an account stated should cover all the dealings between the parties, or that it should include all the claims between them, and either party may show that the balance found was struck upon a partial, and not a general, accounting. p. 623.
8. **ACCOUNT STATED.—Comprehensiveness.—Presumption.**—While an account stated is *prima facie* to be taken as a settlement of all valid items of debit and credit existing between the parties at the time of its statement, this presumption is rebuttable. p. 623.
9. **ACCOUNT STATED.—Conditional Claims.—Presumption.**—There is no presumption that a contingent or conditional liability or claim is included in an accounting, and this rule applies to a claim not due. p. 623.
10. **ACCOUNT STATED.—Evidence.—Conditional Claims.**—In an action on an alleged account stated, evidence showing that certain items which were conditional and not due were not canvassed at the time of the settlement between the parties was insufficient to negative plaintiff's theory of an account stated. p. 623.
11. **PRINCIPAL AND AGENT.—Ratification.—Proof by Inference.**—Ratification by the principal of the acts of his agent may be inferred from facts and circumstances proved. p. 624.
12. **EVIDENCE.—Proof.—Inferences.**—An inference founded on a proved or known fact may be used as the basis for another inference. p. 624.
13. **PRINCIPAL AND AGENT.—Ratification.—Evidence.**—In an action on an alleged account stated, evidence held sufficient to warrant the inference that the settlement in controversy made by an agent was ratified by the principal. p. 625.
14. **PRINCIPAL AND AGENT.—Compromise by Agent.—Ratification.**—The acceptance and retention by the principal of money, property or other benefit as the result of a compromise or settlement by an agent of a claim in favor of or against the principal constitutes a ratification of the compromise or settlement, unless he is without knowledge of the facts. p. 626.

From Marion Superior Court (98,132); *Vincent G. Clifford*, Judge.

Public Savings Ins. Co. v. Greenwald—68 Ind. App. 609.

Action by Henry Greenwald against the Public Savings Insurance Company of America. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Korbly & New, for appellant.

Williams & Schlosser, for appellee.

BATMAN, P. J.—Appellee sued appellant in the court below to recover on an alleged account stated amounting to \$55.50. Appellant answered by general denial, and also filed a counterclaim against appellee, in which it alleged in substance that it is a corporation engaged in the insurance business; that on October 30, 1914, it employed appellee, under a written contract, to act as agent for it in soliciting and writing insurance; that in pursuance of such contract, which is made a part of such counterclaim by exhibit, appellee acted as its agent for such purpose until about January 8, 1915; that during such time appellee solicited and wrote certain insurance policies on behalf of appellant, which were officially lapsed subsequently to said last-named date; that by the lapsing of said policies there was created against the account of appellee, under and by virtue of their said contract, a charge of \$123.15, which is a just and valid claim against appellee in its favor; and that the amount which would otherwise be due appellee is withheld by it in accordance with the terms of their said contract. Appellant filed an answer to said counterclaim, in which he admitted the execution of the contract mentioned therein, and alleged facts showing his performance thereunder, a dispute in their account, and threatened litigation, a settlement of such dispute by an agreement that such employ-

ment should cease and such contract be at an end, a canvassing of their said account, and the striking of a balance due appellee, amounting to \$55.50, which appellant agreed to pay, but had failed to do so. Trial was had by the court on the issues thus formed, resulting in a finding for appellee in the sum of \$55, and judgment was rendered accordingly. Appellant filed a motion for a new trial, which was overruled, and has assigned such ruling in this court as the sole error on which it relies for reversal. Appellant bases its right to a new trial on the alleged reasons that the decision of the court is not sustained by sufficient evidence and is contrary to law.

The questions presented for our determination require a consideration of the evidence, which, briefly stated, tends to show that appellee was employed by appellant, under a written contract, to work for it in its insurance business; that such employment was made through its agent, C. Harlan, to whom appellee reported during the progress of his work and who was charged with the duty of looking over his accounts and directing him as to his work; that, after appellee had worked for appellant a few months under such employment, some difference arose between them with reference to certain collections, and because of such difference appellee did not pay over to appellant certain moneys he had collected for it in the course of his employment; that thereafter said C. Harlan called on appellee at his home in an effort to procure a settlement of such difference; that on such occasion appellee informed said Harlan that he would go down to appellant's office the next day and make settlement, and would then discontinue the employment; that appellee met said Harlan at the time

and place agreed, where the account between appellant and appellee was then canvassed to determine the status of such account with a view of making a final settlement and terminating appellee's employment under such written contract; that as a result of the canvass of such account for such purpose it was found that appellee owed appellant \$59 on account of collections made, and appellant owed appellee \$55.50 for services rendered; that said Harlan was unwilling to accept from appellee the difference between said accounts in settlement, but stated that the way to avoid trouble was for appellee to pay what he owed appellant, and that appellant would then pay him the said \$55.50 in about a week; that appellee agreed to this arrangement, and in consideration of such promise so made to him gave said Harlan his check on the Farmers' Trust Company, payable to appellant, for the sum of \$32.10; that said check was dated January 8, 1915, and bore on its face the following words: "Payment in full of all indebtedness," and was so written to serve as a receipt as appellee stated at the time; that soon after receiving such check said Harlan took the same to said trust company, and after indorsing appellant's name thereon received the money therefor on its behalf; that appellee paid appellant the remainder of said \$59 on Wednesday following such settlement; that in making such settlement no claim was made that anything further would become due appellant under said contract, but the amount to be paid appellee thereunder was definitely fixed and determined by said settlement to be \$55.50, which was to be paid him within the time named.

The contention arises over the effect of such settle-

ment. Appellee contends that it resulted in an account stated, which is the subject of this action, and that there is evidence which at least tends to prove every material fact necessary to his recovery, while appellant asserts the contrary. It contends in effect that the evidence fails to show that such agent had any authority to bind appellant by an account stated, but, on the other hand, affirmatively shows that he had no such authority. In support of this contention appellant claims that, according to the provisions of the written contract of employment, such settlement, at the time it was made, could only result in an account stated by changing the terms of such contract, which by its express provision could only be done by its president; that there is no evidence which tends to prove that such officer made or authorized any change thereof, or that such change was ratified by it, and hence there was a failure to prove an account stated. On this contention it may be said that, if it be conceded that, although C. Harlan was appellant's agent, he was without authority to make such settlement, still the question of ratification remains for our determination. It is well settled that a prin-

1. cipal may ratify the unauthorized acts of his agent, and, when so ratified, such acts become as binding upon the principal as they would have been had such agent been duly authorized in the first instance. 2 C. J. 519; *Fouch v. Wilson* (1877), 59 Ind. 93; *United States Express Co. v. Rawson* (1886), 106 Ind. 215, 6 N. E. 337; *Indiana Union Traction Co. v. Scribner* (1911), 47 Ind. App. 621, 93 N. E. 1014; *Crumpacker v. Jeffrey* (1917), 63 Ind. App. 621, 115 N. E. 62.

The finding of the court for appellee was a finding

of every material fact essential to his right of recovery, whether based on original authority in

2. such agent to make such settlement, or on appellant's ratification of his unauthorized act.

If there is any evidence to sustain such decision, it is sufficient on appeal, although it may be strongly contradicted and not entirely satisfactory. *Thompson v. Beatty* (1908), 171 Ind. 579, 86 N. E. 961; *Warner v. Jennings* (1909), 44 Ind. App. 574, 89 N. E. 908; *Hollingsworth v. Hollingsworth* (1912), 50 Ind. App. 137, 98 N. E. 79; *Monongahela River, etc., Coke Co. v. Walts* (1914), 56 Ind. App. 235, 105 N. E. 160; *Public Utilities Co. v. Cosby* (1915), 60 Ind. App. 252, 110 N. E. 576. In determining whether there is any such evidence, this court must consider not only

3. that which may be said to be direct, but also all reasonable inferences which the trial court may have drawn from the established facts. *Bronnenberg v. Indiana Union Traction Co.* (1915), 59 Ind. App. 495, 109 N. E. 784; *Southern Product Co. v. Franklin Coil Hoop Co.* (1915), 183 Ind. 123, 106 N. E. 872; *Union Traction Co. v. Haworth* (1918), 187 Ind. 451, 115 N. E. 753, 119 N. E. 869; *Carter v. Richart* (1917), 65 Ind. App. 255, 114 N. E. 110.

An examination of the evidence discloses that appellee was the only witness who testified as to the circumstances and terms of such settlement,

4. which was in effect substantially as we have stated. After he had testified and rested his case in chief, appellant offered no evidence to contradict appellee's evidence in that regard, but called its president to testify regarding other matters, mainly explanatory of the provisions of the contract in question. During the course of his examination as a wit-

ness he testified in substance that he was acquainted with appellee; that he was at one time appellant's agent, but was not in its employ now; that he was familiar with his account, and with the settlement supposed to have been made with him on January 8, 1915; that he was not present when such settlement was made, but had the reports made to him from the office where the work was done and correspondence had. It should be noted that this admission of knowledge as to appellee's account and as to such settlement was made after appellee had testified with reference to its purpose and terms, and appellant thereby had been fully informed as to his contention in that regard; that, notwithstanding such fact, the president of appellant, who, by the terms of such contract, was the only person clothed with authority to alter the same, made such admission, without claiming that the facts with reference to such settlement, with which he admitted he was familiar, were different from those to which appellee had testified. True, appellant's president, on objection of appellee, was not permitted to state the particulars of such settlement, because his knowledge of the same was obtained from reports made to him from the office where the work was done and the correspondence had, still he was not denied the privilege of denying the authority of Harlan to make such settlement, or knowledge of the facts and circumstances to which appellee had previously testified concerning the same. Such denial would have been proper, but it was not made. It should be further noted that appellant did not produce as a witness the agent, Harlan, the only person known to have been present at such settlement other than appellee, nor account for his absence. It is well

settled that, where a person has it within his

5. power to produce a witness, presumably favorably disposed toward him, to explain a transaction, and fails so to do, the presumption is
4. that the testimony, if produced, would be unfavorable to him. *Indiana Union Traction Co. v. Scribner, supra.* Under all the circumstances the trial court would have been justified in finding that the facts with reference to such settlement were correctly shown by the evidence of appellee, and further justified in drawing the inference that appellant had full knowledge thereof soon after such settlement was made.

It has been held that ratification means the adoption of that which was done for and in the name of another without authority; that it is a question of fact, and ordinarily may be inferred from the conduct of the parties, including silence with knowledge of the facts, and knowingly accepting benefits from an unauthorized act; that such knowledge, like other facts, need not be proved by any particular kind or class of evidence, but may be inferred from facts and circumstances; and that ratification by corporations may be proved in like manner. *National Life Ins. Co. v. Headrick* (1916), 63 Ind. App. 54, 112 N. E. 559; *Indiana Union Traction Co. v. Scribner, supra.* It is a general rule of agency that a principal, who

6. adopts the act of one professing to act for him, must adopt it *in toto*, and will not be permitted to claim the benefit arising therefrom, and at the same time repudiate the burden thereof. *Adams Express Co. v. Carnahan* (1902), 29 Ind. App. 606, 63 N. E. 245, 64 N. E. 647, 94 Am. St. 279; *Cleveland, etc., R. Co. v. Blind* (1914), 182 Ind. 398, 105 N. E.

483, 491; *Hunt v. Listenberger* (1895), 14 Ind. App. 320, 327, 42 N. E. 240, 964; *Reeves & Co. v. Miller* (1911), 48 Ind. App. 339, 95 N. E. 677.

It is not claimed that appellant has returned or offered to return any of the benefits it received from such settlement. . Under such circumstances and the rules stated, the trial court may have found that such settlement had been ratified, and by reason of such fact rendered judgment for appellee. There was substantial evidence tending to sustain such finding, and hence, under the well-established rule stated *supra*, we are bound thereby.

Judgment affirmed.

Ibach, C. J., Caldwell, J., and Dausman, J., concur.
Hottel, J., and Felt, J., not participating.

ON PETITION FOR REHEARING.

BATMAN, J.—Appellant has filed a petition for a rehearing, and insists with much earnestness that this court erred in its conclusions in this case. As much of its contention is predicated on the provisions of a contract between the parties, introduced in evidence by appellant on the trial, we here set out such portions as appear to be material to such contention. This contract, after reciting the fact of appellee's appointment as agent of appellant, and specifying certain duties of appellee thereunder, contains, among others, the following provisions:

“6. That I am to receive a special salary equal to the amount shown in the following schedule, based upon my weekly collectible debit, as follows: When my debit is less than \$20, I am to receive \$5 per week. When \$20 and less than

\$30, I am to receive \$6 per week, etc. * * *

“6a. I am to have no interest in the collections I make and am not to be entitled to any special salary for making said collections until the gross sum thereof has been paid over by me to the company in cash.

“7. That in addition to the amount specified in clause six, an increase salary is to be paid to me, amounting to fifteen (15) times the net increase of my collectible weekly debit; but should a decrease in the amount of my weekly debit occur at any time, a charge is to be made against my account equal to the increase salary which would have been due me on the same amount of increase, which charge can be offset by the production of further net increase in debit or by the payment of the amount in cash, or my special, or increase salary or both may, in the discretion of the company be withheld until the indebtedness is satisfied.

“7a. It is agreed that not until I have remitted to the company all collections made by me each week, and from week to week, am I to be allowed any special salary, increase salary or any other compensation for my services. It is further agreed that I shall have no claim on the compensation provided for in this agreement until after the total amount called for by my account has been remitted to the company in full by me while in their employ, and that I shall not be entitled to receive special salary for collecting my debit only, but that I do hereby agree to continue to canvass for and to write insurance for

the company through the entire week until Saturday of the week in which I claim special salary.

“7b. It is hereby agreed that all money collected by me belongs to the company, and is to be paid over by me to the company in cash at such time or times as provided for in this agreement or the company’s rules. I am not to retain any part of said money for my service as special salary, increase salary or for any other purpose.

“8. Should business of any description be transferred to me, no increase salary is to be paid on the increase in my collectible weekly debit resulting from such transfer, but only on the amount of net increase shown after deducting the amount transferred and such transferred business, if subsequently lapsed, will not affect my increase salary, if reported by me for lapse at such time as to admit of the official lapsing for a date within the period prescribed by the company’s rules.

“8a. It is agreed that I am to receive no increase salary on policies transferred to my account from another agent or the company’s debit.

“9. Should business of any description be transferred from my agency, the decrease in my collectible weekly debit resulting from such transfer is not to be charged against my increase salary, provided the business becomes chargeable under the company’s rules and this agreement, to the agent to whom it is transferred. It is, however, expressly agreed that all policies officially transferred from my agency, either during my term of service with the company or after the termination of my employment, either by resig-

nation, dismissal or otherwise, and reported for lapse at such time as to admit of the official lapsing without charge, under the company's rules against any agent who has received the transfer of the policies, shall be charged against my account in accordance with this agreement.

"10. That if any business is transferred from my agency, and it is again transferred before the agent who received it from me has held it long enough to become chargeable with it under this agreement, I am to be held responsible in case of its lapse, unless some one of the agents who received it in transfer has retained the business long enough to become chargeable with it under this agreement.

"11. That if my collectible weekly debit should decrease in any week, and I should subsequently claim increase salary on any future increase of business, it will only be payable upon the net increase from the last date the increase salary was allowed.

"12. That in case any policy or policies in my agency become lapsible under the company's rules through default in payment of premiums and I fail to report such policy or policies to the company for lapse at the time specified in said rules, the arrears in excess of the amount regularly allowed by the company are to be charged to my account.

"13. That I am to be allowed to draw increase salary only to the amount the character of the new business, after investigation, will in the opinion of the company warrant.

"14. It is expressly agreed that I am not to

be entitled to any special salary or increase salary until all the conditions and agreements contained in this agreement have been fully complied with by me.

“15. That should the arrears on my account be deemed excessive by the company, or my collection below the percentage of the debit prescribed by the company’s rules, special salary and increase salary may be withheld until the rules are complied with. * * * Note.—The terms and conditions as herein set forth may be altered only by the president of the company. Therefore, any arrangement differing from this agreement, unless approved by the company, will be null and void.”

Appellant admits that the issues under which the case was tried, and the respective positions taken by the parties on appeal, are fully and accurately stated in the court’s opinion, and in its argument in support of its petition for a rehearing, expressly adopts the court’s summary of the facts and circumstances shown in evidence, with two added statements, one of which is that appellee admitted on cross-examination that certain items of his account were not canvassed at the time of the alleged settlement, and that their computation was to be a matter of later concern. Appellant contends that this admission in itself serves to negative appellee’s theory of an account stated between the parties. The facts with reference to such added statement are that, after appellee had stated that appellant’s agent, Harlan, had said to him in the course of the settlement that he was not in the employ of the company, and was not liable under the contract, he was asked by appellant’s attorney to

give Harlan's words in that regard, and answered: "Just the verbatim words I don't remember, but the essence was when we were making the settlement, he said I wasn't to be employed any more under this contract, and wasn't to write any other business, and the prospects would be turned over to the next man, and I would get the commission out of it anyhow."

In answer to appellant's contention in this regard, it may be noted that it is not necessary that

7. an account stated should cover all the dealings between the parties, or that it should include all claims between them, and either party may show that the balance found was struck upon a partial and not a general accounting. 1 C. J. 683, 708. Thus it has been held that an account stated for the transactions of one month is not affected by the fact that the transactions for a subsequent month were not brought into it. *Harrison v. Birrell* (1911), 58 Ore. 410, 115 Pac. 141. While an account stated is *prima facie* to be taken as a settlement of all valid

8. items of debit and credit existing between the parties at the time of its statement, this presumption is rebuttable. Moreover, there is no

9. presumption that a contingent or conditional liability or claim is included in an accounting, and the same is true of a claim not due. 1 C. J.

10. 708. The evidence relied on by appellant to defeat the account stated only tends to show that certain items of commissions growing out of "prospects," which were evidently contingent and conditional and hence not due, were expressly excluded from such settlement. This could not have the effect for which appellant contends.

Appellant also calls attention to the fact that the

first step taken by it, after appellee had rested its case, was to identify and read in evidence the

11. contract between the parties. It contends that this instrument precluded, as a matter of law, the statement of an account arising thereunder, which would be binding on appellant, unless it was represented at the time by its president; that no attempt was made to discharge that burden through the introduction of affirmative evidence, and that no inference stated in the court's opinion could properly serve to supply the missing proof. If it could be said that this contention was tenable, the question of ratification would still remain, as stated in the original opinion. Ratification may be inferred from facts and circumstances proved. *National Life Ins. Co. v. Headrick* (1916), 63 Ind. App. 54, 112 N. E. 559. But appellant contends that in the instant case the court in arriving at its conclusion on the ques-

12. tion of ratification violated the settled rule that one inference cannot be based on another.

In making this contention appellant has evidently failed to give the rule stated its proper interpretation. It is well settled, both on reason and authority, that such rule does not preclude the use of an inference as the basis of another inference, provided the first inference is founded on a proved or known fact. *Hinshaw v. State* (1896), 147 Ind. 334, 47 N. E. 157; *Cleveland, etc., R. Co. v. Starks* (1915), 58 Ind. App. 341, 106 N. E. 646; *Indiana Creek Coal, etc., Co. v. Calvert, ante* 474, 119 N. E. 519, 525, 120 N. E. 709. In the case last cited it is said: "An inference so drawn becomes a fact in so far as concerns its relation to the proposition to be proved. It merges itself into the proved fact from which it

was deduced, and the resulting augmented fact becomes a basis for other proper inferences. To assign to an inference properly drawn a position inferior to an established fact would in effect nullify its probative force."

When this rule, as properly construed, is applied to the facts and circumstances of this case, it leaves no substantial ground for appellant's conten-

13. tion. Appellee testified on the trial, among other things, that a difference existed between the parties as to the status of their account under the contract in question; that appellant's agent, Harlan, assumed to make an adjustment of this difference with appellee on behalf of appellant, in which it was agreed that the sum of \$59 was due from appellee to appellant on account of collections made, and that the sum of \$55.50 was due from appellant to appellee for services; that appellee paid appellant the said sum agreed to be due it, on the promise of said Harlan that appellant would pay appellee the sum agreed to be due him in a few days thereafter. Appellee was the only witness who testified in this regard. After he had thus testified, the president of appellant was called as a witness and admitted that he was familiar with the details of said adjustment, but failed to deny that such facts were different from those given in evidence by appellee. This circumstance was sufficient to justify the inference that the details, which he admitted he knew, were the same as had been given in evidence by appellee, notwithstanding the fact that he was not permitted to give incompetent evidence of the terms thereof. A letter in evidence, written by appellant's said president to the attorneys of appellee, tended to show that he re-

ceived his information regarding such adjustment a short time after it was made. There was no evidence that the amount paid by appellee to appellant in pursuance of said adjustment was ever returned or tendered to appellee, and no claim is made that this was done. The contract itself provides that "any arrangement differing from this agreement, unless approved by the company, will be null and void." This is a strong circumstance indicating that appellant contemplated the making of settlements, by agents without authority, which should thereafter be ratified by it. These facts and circumstances, aided by the inference stated, are sufficient to warrant the further inference that the adjustment in question had been ratified by appellant.

Appellant also contends that appellee could not acquire any rights against his principal by making an adjustment of their differences through the agent, Harlan, as his limitations in that regard were known to him through the express terms of the contract, and furthermore that the evidence showed that appellant through its president was denying any liability to appellee within a few days after the alleged settlement, which important fact appellant asserts was omitted from our former opinion. However, it is apparent that such facts would not preclude appellant from ratifying the adjustment made by its agent, and therefore are not material factors in determining the question under consideration.

It is finally contended that the contract between the parties shows that appellant was legally entitled to the amount which appellee paid it, and there-
14. fore no inference of ratification can be based on the fact that it retained the same. In mak-

Rusk v. Kokomo Steel, etc., Co.—68 Ind. App. 627.

ing this contention appellant has evidently overlooked the fact that this amount was paid by appellee as the result of an adjustment of an existing difference, and therefore the rule which it seeks to invoke does not apply. It has been held that the acceptance and retention by the principal of money, property or other benefit, as the result of a compromise or settlement by an agent of a claim in favor of or against the principal, constitutes a ratification of the compromise or settlement, unless he is without knowledge of the facts. 2 C. J. 493, 504. Under the facts and circumstances of this case, it would be manifestly unjust to permit appellant to secure the fruits of an adjustment of a difference with appellee, and then deny him the inducement which led him to yield the same.

Petition for a rehearing denied.

NOTE.—Reported in 118 N. E. 556, 121 N. E. 47.

RUSK v. KOKOMO STEEL AND WIRE COMPANY.

[No. 10,308. Filed December 10, 1918.]

1. *APPEAL.—Notice of Appeal.—Sufficiency.—Statute.*—Section 681 Burns 1914, §640 R. S. 1881, providing that notice of appeal shall show an appeal from the judgment or some specific part thereof, does not require an appellant to describe particularly the provisions of the judgment from which he appeals unless he questions only a part thereof, so that a notice that a party "has appealed this cause," is in substantial compliance with the statute, and the appeal will be treated as challenging the whole judgment. p. 628.
2. *APPEAL.—Vacation.—Perfecting.—Transcript.—Time for Filing.*—Where judgment was rendered on June 23, 1917, and the motion for new trial was overruled December 15, 1917, appellant had 180 days from the date of the ruling on the motion within which to

Rusk v. Kokomo Steel, etc., Co.—68 Ind. App. 627.

perfect an appeal, even though he subsequently decided to waive any error in such ruling. p. 629.

3. **APPEAL.—Briefs.—Sufficiency.—Abstract Propositions of Law.**—Where appellant's brief, in its points and authorities, set forth numerous propositions of law which were not applied to any particular ruling of the trial court, and also failed to set out any statement of errors relied on for reversal, and its supplemental statement, filed after such defects in the original brief had been pointed out by appellee in his objections to the record and briefs, merely showed that appellant relied on an assignment of error containing eight specifications, but made no attempt to restate the propositions of law or to apply them to the particular rulings in issue, the amended brief was insufficient to present any question for review, notwithstanding the act of 1917, Acts 1917 p. 523, requiring a liberal construction of briefs. pp. 630, 631.
4. **APPEAL.—Briefs.—Requisites and Sufficiency.—Statute.**—Section 3 of the act of 1917, Acts 1917 p. 523, §691a Burns' Supp. 1918, requiring a liberal construction of briefs, can aid appellant only where a good-faith attempt is made to meet the statutory obligations, but in the absence of any effort by appellant to comply with the statute after the defects in his briefs have been pointed out by appellee, the statute cannot aid him. p. 631.

From Clinton Circuit Court; *Joseph Combs*, Judge.

Action by the Kokomo Steel and Wire Company against Burton D. Rusk and another. From the judgment rendered, the defendant named appeals. *Appeal dismissed.*

Williams & Murphy and *Sheridan & Gruber*, for appellant.

Thomas M. Ryan and *Russell P. Harker*, for appellees.

HOTTEL, J.—This is a vacation appeal from a judgment for appellees in an action brought by appellee

Kokomo Steel and Wire Company against its

1. coappellee Clark and appellant, Rusk. Appellant's briefs were filed on July 29, 1918, and on August 14, 1918, within fifteen days after the expira-

tion of the time allowed for filing such briefs, appellee Clark submitted certain "Objections to Record and Briefs," under §3 of the act of 1917 concerning civil procedure (Acts 1917 p. 523, §691a *et seq.* Burns' Supp. 1918), and also filed a motion to dismiss the appeal on the ground that the notice thereof, as served below, does not indicate from what part of the judgment of the trial court this appeal is prosecuted. Section 681 Burns 1914 provides that such notice shall show an appeal "from the judgment or some specific part thereof," and the notice in this case recites that "Burton D. Rusk * * * has appealed this cause to the Appellate Court of Indiana." There is nothing in the statute which requires an appellant to describe particularly the provisions of the judgment from which he appeals, unless he seeks to question only a part thereof, and, in the absence of such particular description, the appeal will be treated as challenging the entire judgment of the trial court. The notice given by appellant is in substantial compliance with the statute and properly serves to apprise appellees of the action which he has taken.

On August 29, 1914, appellant filed certain amendments to his original briefs by which he obviated in substance a part of the objections theretofore

2. pointed out by appellee Clark. On September 13, 1918, appellee Clark filed a second motion to dismiss the appeal "for the following additional reasons not stated in his prior motion to dismiss herein." The first of these additional reasons goes to the sufficiency of appellant's brief to present any question for review, and the second is predicated on the fact that the judgment appealed from was rendered on

June 23, 1917, while the transcript was not filed in this court until May 3, 1918, more than 180 days thereafter. The latter facts ought properly to have been presented in the first motion to dismiss, but, in any event, they are to be considered with reference to the further fact that appellant's motion for a new trial, properly filed, was not overruled until December 15, 1917. He then had 180 days within which to perfect an appeal, even though he subsequently decided to waive the error, if any, in the overruling of that motion. *Blaemire v. Barnes* (1910), 173 Ind. 657, 91 N. E. 232; *Blose v. Myers* (1915), 58 Ind. App. 34, 37, 107 N. E. 548.

The contention relative to the insufficiency of appellant's brief presents a more serious question.

Under the heading of "Points and Authorities," that brief, as originally prepared, contains a statement of thirty-two propositions of law, not one of which is made to apply directly to any particular ruling or decision of the trial court. The brief also failed to set out any statement of errors relied on for a reversal. These facts were pointed out by appellee Clark in his objections to the record and briefs, whereupon appellant filed a supplemental statement showing that it relies on an assignment of errors containing eight specifications, of which the first challenges, separately and severally, the ruling on the demurrers to each of four paragraphs of complaint. No attempt was made, however, to restate the propositions of law relied on by appellant or to classify them under proper headings which should indicate their application to the particular rulings in issue. There can be no doubt, under many decisions of this and the Supreme Court, that appel-

Rusk v. Kokomo Steel, etc., Co.—68 Ind. App. 627.

lant's brief, even as amended, is insufficient properly to present any question for review (*Houck v. McCoy* [1916], 185 Ind. 713, 114 N. E. 437; *Palmer v. Beall* [1915], 60 Ind. App. 208, 110 N. E. 218), and an application of the rule announced in those decisions, unless modified by the legislative enactment of 1917, will authorize a dismissal of the appeal. It is provided in Acts 1917 p. 523, *supra*, §3, that:

4. "This section of this act is remedial and shall receive a liberal construction so that all appeals shall be considered and decided on their merits, whenever the court is enabled from the briefs and record to determine and pass upon the questions sought to be raised." This section prescribes the method and limits the right of an appellee to make objections to form and contents of his adversary's brief and undoubtedly requires that all efforts to overcome such objections and to make necessary amendments shall be liberally construed to the end that appeals may be decided on their merits, but there is nothing in this section, or in any other provision of law, which justifies an appellant in ignoring defects and omissions to which his attention has thus been called, on the expectation that the appellate tribunal will supply the proper amendments. A good-faith attempt to meet the obligations of the statute will justify a reliance on its beneficial provisions, but, where no such effort is made, there is nothing on which the rule of liberal construction may operate.

Under the conditions here present, we are unable to determine what rulings of the circuit court are actually challenged by this appeal, and we hold therefore that, by reason of the insufficiency of appellant's briefs, the second motion to

Bollenbacher v. Foley—68 Ind. App. 632.

dismiss must be sustained. An examination of the record, however, discloses a special finding of facts by the trial court, which is not subjected to criticism in appellant's brief, and on which the judgment below seems to represent substantial justice between the parties.

For the reasons above stated, the appeal is dismissed.

NOTE.—Reported in 121 N. E. 87.

BOLLENBACHER v. FOLEY ET AL.

[No. 9,568. Filed December 11, 1918.]

1. REFORMATION OF INSTRUMENTS.—*Pleading.—Sufficiency.*—In a suit to quiet title, a cross-complaint seeking the reformation of deeds, and to quiet title to all the land of which the cross-complainant had possession under the deeds, was sufficient where it alleged a previous definite contract between the parties to the deed for a conveyance of the land in dispute, the intent to include such land in the deed, the ignorance of the parties of the mistake, and the payment of a valuable consideration. p. 635.
2. PARTIES.—*Defects.—Waiver.*—The question as to a defect of parties was waived where the appellant failed to present his objection to the trial court. p. 636.
3. VENDOR AND PURCHASER.—*Notice.—Possession.*—Where a cross-complainant took possession of land under a deed containing an incorrect description, and made permanent improvements thereon, including a permanent fence on the boundary in dispute, the plaintiff, who obtained the deed under which she claimed long after such improvements were made and with full knowledge of the facts, was not an innocent purchaser. p. 636.
4. QUIETING TITLE.—*Title.*—A cross-complainant seeking to quiet title must recover on the strength of his own title. p. 637.

From Monroe Circuit Court; *Charles J. Carpenter*, Special Judge.

Suit by Ella T. Bollenbacher against Arthur L. Foley and others, wherein the latter filed a cross-complaint. From a judgment for the defendant on his cross-complaint, the plaintiff appeals. *Affirmed.*

Ira C. Batman, Robert G. Müller and James W. Blair, for appellant.

Edwin Corr, for appellees.

IBACH, J.—Appellant's complaint against appellees was in two paragraphs. The first contained the usual averments in the ordinary suit to quiet title, and the second is in the usual form of an action in ejectment. Appellee Arthur L. Foley filed his separate answer and a cross-complaint against appellant in two paragraphs, in which he asked that two separate deeds executed to him by the common grantor of both parties be reformed and that his title be quieted to the land claimed by appellant. Appellant filed a demurrer with memorandum to the second paragraph of the cross-complaint, which was overruled and exception saved, and she then filed answer to each paragraph of cross-complaint and a reply to the separate answer of Arthur L. Foley, and said appellee filed his reply to the second and third paragraphs of appellant's answer to his cross-complaint.

There was a trial by the court with special finding of facts and conclusions of law. The conclusions of law were in appellee Arthur L. Foley's favor on his cross-complaint and judgment was rendered for him thereon.

The errors relied on for reversal arise out of the overruling of the demurrer to the second paragraph of the cross-complaint and the conclusions of law stated upon the finding of facts.

The facts, as found by the court, are in substance the following: For some years prior to the execution of the deeds involved in this controversy Eliza Alexander was the owner of certain real estate in the city of Bloomington described as Seminary lot 83. In 1898 she subdivided this lot into smaller tracts and placed stakes at the several corners thereof. Immediately thereafter appellee Arthur L. Foley purchased one of these lots, 58½ feet east and west, and 228 feet in depth, as located between two of said stakes for the sum of \$800. The said Alexander undertook to execute a deed therefor, but by the mutual mistake of both parties the lot so purchased was described as being six feet farther east than its true location. The purchaser went into possession of the lot as designated by the stakes set at the corners thereof under the belief of both parties that it was the same lot described in the deed. In 1899 said Foley purchased an additional strip of land twelve feet in width and the same length as the former, adjoining and immediately to the west of it, and paid therefor the sum of \$100. By mutual mistake of the parties this strip of land was likewise described in the deed as being six feet farther east than its true location. Appellee Foley took possession of this strip also upon the execution of the deed, according to its true location, erected a house on the first purchased lot, and on the twelve-foot strip made lasting and valuable improvements, among which was a stone and concrete wall within a few inches of the west side, upon a line agreed upon at that time by said Alexander and said appellee as being the true boundary line between their respective lands, and the said Arthur L. Foley has had since said agreement exclu-

sive and open possession of all of the real estate for 70½ feet immediately east of said fence under a claim of title through his said deeds. On March 21, 1905, the common grantor sold to appellant all and only so much of said Seminary lot 83 as lay west of said fence and boundary line, and executed to her a warranty deed for the same, but erroneously described the land as extending six feet farther east than the true boundary line of said lot.

Upon the facts so found, the court concluded that appellant was not entitled to have her title quieted to the lands described in her complaint, nor to the ejectment of appellees therefrom, and that appellee Arthur L. Foley is not entitled on his cross-complaint to have the deed first executed reformed; but that he is entitled to have the second deed reformed and corrected, and his title quieted thereto as prayed.

As to the first-alleged error, it is sufficient to say that appellee by his cross-complaint seeks a reformation of his deeds, and that the title to all the

1. land purchased by him and of which he took possession be quieted. In such proceedings the pleading will be held sufficient if it appear therefrom that there was a previous definite contract between the parties to the deed for a conveyance of the land in dispute; that the parties thereto intended to include such land in such deed; that the parties were ignorant of the alleged mistake, or, in other words, that the mistake was one of fact and not of law, and that the purchase was made for a valuable consideration. Our examination of the pleading before us shows that all of these essential averments are present, and as against the objections pointed out in appellant's memorandum accompanying her demurrer

the cross-complaint is sufficient. *Radebaugh v. Scanlan* (1907), 41 Ind. App. 109, 114, 82 N. E. 544.

The first point presented by appellant's brief on the objections to the conclusions of law relates to alleged defects of parties, but no objection of

2. this kind appears to have been made to the trial court, and is therefore waived. Such question could only have been raised either by demurrer upon that ground or answer in abatement, and could not be raised by exceptions to the conclusions of law. *Boseker v. Chamberlain* (1903), 160 Ind. 114, 66 N. E. 448; *Caraskaddon v. Pine* (1900), 154 Ind. 410, 56 N. E. 844. See, also, *Warbritton v. Demorett* (1891), 129 Ind. 346, 348, 27 N. E. 730, 28 N. E. 613.

As to the second point, it is sufficient to say that the finding conclusively shows that appellee was a good-faith purchaser; that appellant obtained

3. her deed with full knowledge that appellee had had exclusive and open possession of all the real estate described in his cross-complaint and had erected permanent improvements thereon, including a permanent wall or fence which fixed the western boundary line of his land, long prior to the date of appellant's alleged purchase. These facts are sufficient to furnish notice to all the world of appellee's claims, and no one could be said to be an innocent purchaser in opposition to such open and exclusive possession, or, as the rule is sometimes stated, if there be "circumstances which in the exercise of common reason and prudence ought to put a man on particular inquiry, he will be presumed to have made that inquiry and will be charged with notice of every fact which that inquiry would have given him." 34 Cyc 958.

Roper v. Cannel City Oil Co.—68 Ind. App. 637.

So far as the findings are concerned which have to do with the correction of the description in appellant's deed, if such findings are open to that

4. construction, they would be outside the issues and should be disregarded. But, in any event, they are not material for the reason that appellee must recover upon the strength of his own title, which we have heretofore shown was amply supported by the findings, and therefore the court did not err in its conclusions of law.

Judgment affirmed.

Batman, J., not participating.

NOTE.—Reported in 121 N. E. 124. See under (1) 34 Cyc 977; (3) 34 Cyc 958, 39 Cyc 1756.

ROPER v. CANNEL CITY OIL COMPANY.

[No. 9,641. Filed December 11, 1918.]

1. HUSBAND AND WIFE.—*Agency*.—A husband may act as agent for his wife and bind her by note. p. 640.
2. HUSBAND AND WIFE.—*Agency*.—*Evidence*.—Though the existence of the marital relation does not establish the relation of principal and agent between husband and wife, such fact may be considered as a circumstance in determining the question. p. 640.
3. HUSBAND AND WIFE.—*Agency*.—*Evidence*.—The relation of agency between husband and wife is governed by the same principles that apply to other agencies. p. 640.
4. HUSBAND AND WIFE.—*Principal and Agent*.—*Evidence*.—To establish the relation of agency between husband and wife, the evidence must be clear and satisfactory and sufficiently strong to explain and remove the equivocal character in which the wife is placed by reason of the marital relation. p. 640.
5. PRINCIPAL AND AGENT.—*Proof*.—The relation of principal and agent may be shown by circumstantial evidence. p. 640.
6. APPEAL.—*Evidence*.—*Sufficiency*.—The court on appeal, in determining the sufficiency of the evidence, is limited to a considera-

Roper v. Cannel City Oil Co.—68 Ind. App. 637.

tion of that most favorable to the appellee, including such inferences in its favor as the jury might have reasonably drawn therefrom. p. 641.

7. **HUSBAND AND WIFE.**—*Relation of Principal and Agent.*—*Evidence.*—In an action against a married woman on a promissory note, evidence is held sufficient to show that the husband had authority to execute the note as agent for the defendant. p. 641.
8. **TRIAL.**—*Province of Jury.*—The jury had the right to consider and weigh all the evidence, including such fair and reasonable inferences as might be drawn therefrom. p. 643.
9. **APPEAL.**—*Review.*—*Verdict.*—*Evidence.*—Where there is some evidence to sustain the verdict as to every material issue tendered, the evidence will be held sufficient on appeal. p. 643.
10. **APPEAL.**—*Rulings on Evidence.*—*Reasons.*—If the ruling of the trial court in excluding evidence can be sustained for any reason, it will not be ground for reversal on appeal. p. 644.
11. **WITNESSES.**—*Conclusions.*—The question, "Tell the court and jury all the facts and circumstances of the transaction in which the note in suit was given," was objectionable as calling for the conclusion of the witness. p. 644.
12. **APPEAL.**—*Rulings on Evidence.*—*Discretion of Trial Court.*—*Review.*—The court on appeal will not review the action of the trial court in refusing to permit a witness to answer a question which was leading and called for a conclusion, unless such refusal was an abuse of the broad discretion of the court in controlling the reception of the evidence. p. 645.
13. **TRIAL.**—*Offer to Prove.*—*Contents of Instruments.*—Offered evidence involving the witness's interpretation of written instruments not before the court was incompetent; hence, error may not be predicated on the action of the court in refusing to permit the witness to answer. p. 645.
14. **APPEAL.**—*Briefs.*—*Presenting Errors.*—*Review.*—In view of rules governing the preparation of briefs, the appellant waived any grounds urged in his motion for new trial to which no specific reference was made in the points and authorities of his brief. p. 645.

From the St. Joseph Superior Court; *George Ford*, Judge.

Action by the Cannel City Oil Company against Ella M. Roper. From a judgment for the plaintiff, the defendant appeals. *Affirmed.*

Roper v. Cannel City Oil Co.—68 Ind. App. 637.

Ralph S. Feig, John W. Schindler and Stuart McKibbin, for appellant.

Van Fleet, Hubbel & Dinnen, for appellee.

BATMAN, J.—This is an action by appellee against appellant on a promissory note. The complaint was answered by a general denial and a plea of *non est factum*. The cause was tried by a jury, which returned a verdict in favor of appellee, and on which judgment was rendered against appellant for \$625 and costs. A motion for a new trial was filed and overruled. This action of the court constitutes the sole error on which appellant relies for a reversal.

Appellee contends that this appeal cannot be considered on its merits, because the transcript is not properly authenticated. This question was determined adversely to appellee in ruling on its motion to dismiss the appeal, and requires no further consideration. It is also contended that appellant's brief is defective in certain particulars, but, in view of the conclusion we have reached with reference to the merits of the case, it will not be necessary to pass upon such questions.

Appellant contends that the verdict is not sustained by sufficient evidence. She bases this contention on a claim that the uncontradicted evidence shows that she did not execute the note in person, but that her name was signed thereto by her husband; that there is no evidence that her said husband had authority to execute the note as her agent, and that the uncontradicted evidence shows that he had no such authority. In considering this contention it may be well to note certain pertinent rules, which may be accepted as settled.

A husband may act as agent for his wife and bind her by note. *Wasem v. Raben* (1910), 45 Ind. App.

221, 90 N. E. 636. The mere fact of the marital
1. relation, however, does not establish such agency. 21 Cyc 1663; 13 R. C. L. 1168. But such fact may be considered as a circumstance
2. in determining the question of agency. 21 Cyc 1240; *Barnett v. Gluting* (1891), 3 Ind. App. 415, 29 N. E. 154, 927. The relation of agency
3. between husband and wife is governed by the same principles which apply to other agencies. 15 Am. and Eng. Ency. Law (2d ed.) 855,
4. 856; *Runyon v. Snell* (1888), 116 Ind. 164, 18 N. E. 522, 9 Am. St. 839; *Wasem v. Raben*, *supra*. But, to establish such relation between
5. husband and wife, the evidence must be clear and satisfactory and sufficiently strong to explain and remove the equivocal character in which the wife is placed by reason of the marital relation. *Rowell v. Klein* (1873), 44 Ind. 290, 15 Am. Rep. 235. The relation of principal and agent may be shown by circumstantial evidence alone. *Indiana, etc., R. Co. v. Adamson* (1888), 114 Ind. 282, 15 N. E. 5; *Broadstreet v. McKamey* (1908), 41 Ind. App. 272, 83 N. E. 773; *Ellison v. Flint* (1909), 43 Ind. App. 276, 87 N. E. 38; *Stockwell v. Whitehead* (1911), 47 Ind. App. 423, 94 N. E. 736. This rule has been applied where the relation of principal and agent between husband and wife was involved. *Lindquist v. Dickson* (1906), 98 Minn. 369, 107 N. W. 958, 6 L. R. A. (N. S.) 729, 8 Ann. Cas. 1024; *Barnett v. Gluting*, *supra*.

It is also well settled that, in determining the sufficiency of the evidence, this court is limited to a con-

Roper v. Cannel City Oil Co.—68 Ind. App. 637.

sideration of that most favorable to appellee, 6. including such inferences in its favor as the jury might have reasonably drawn therefrom. *Southern Product Co. v. Franklin Coil Hoop Co.* (1915), 183 Ind. 123, 106 N. E. 872.

In this case the evidence favorable to appellee tends to show that the note in suit was given in part payment of stock in the Cannel City Oil Company, 7. the appellee herein; that the purchase of the stock was made by James A. Roper, the husband of appellant, who executed the note in suit by signing her name thereto and making delivery thereof; that appellant and said James A. Roper had lived together as husband and wife for about forty-five years; that appellant during said time had acquired considerable property, some of which had come to her as gifts from her said husband; that her said husband had been actively engaged in business during said time, and had been entrusted with the management of much of her business both prior and subsequently to the execution of the note in suit; that appellant was the owner of a large amount of real estate, but she could not tell where all of it was located, and had but little idea of the value of any of it. She first testified that the only personal property she owned was some household furniture and trinkets. She afterwards recalled that she owned stock in the Roper Furniture Company and at least three banks and trust companies, but she could not tell the amount of stock which she owned in any of them or give an estimate of its value. When testifying she said she was not able to remember that she owned any other personal property, but her husband testified that she was the owner of a large amount of other personal

property, with which he appeared to be familiar, consisting of stocks, bonds and notes in and against various companies, aggregating in value many thousands of dollars. After her husband had so testified she made no denial of such ownership, nor explanation of the fact that while she claimed to transact her own business without material aid from her husband, she was not able to remember that she was the owner of such property. Neither did she give any evidence to indicate that she knew when, where, or of whom, or at what cost, any of it was acquired. There was also evidence tending to show that appellant received her first information as to the pendency of this action in May or June, 1915, through certain papers received by mail at Little Rock, Arkansas, where she was then staying; that she did not return from Little Rock until the following July, and in the meantime did not communicate with her husband regarding the note, and did not inquire with reference to his signing the same until recently; that she did not employ attorneys to make a defense for her, but left that to her husband; that she did not see her attorneys nor communicate with them with reference to the matter until the week preceding the trial in October, although the suit had been pending since the preceding June. When appellant was asked if she did not know that it was a fact that her husband did not have any property at all, that it was all in her name, and that he had to do business in her name with everybody, she answered that she did not know. Some of the answers of appellant to questions propounded by counsel for appellee manifested an attempt to evade certain material facts pertinent to the main question at issue. These facts and circumstances, when considered in connection

with the reasonable inference which the jury might have drawn therefrom, afford some evidence that the husband of appellant was vested with the necessary authority to purchase the stock in question for her, and to execute the note in suit on her behalf as an incident thereto.

True, appellant and her husband both denied the existence of any such authority, but the jury had a right to consider and weigh all the evidence,

8. including such fair and reasonable inferences as might be drawn therefrom. In doing so it may have been entirely justified in disregarding such denials, and concluding that the evidence as a whole was sufficient to establish the alleged agency.

There was not only some evidence to sustain the verdict in that regard, but also as to every other material issue tendered. Under these circum-

9. stances the evidence is sufficient on appeal.

Dorrell v. Herr (1915), 184 Ind. 445, 111 N. E. 614; *National Life Ins. Co. v. Headrick* (1916), 63 Ind. App. 54, 112 N. E. 559. In reaching this conclusion we have not been unmindful of the rules cited by appellant's learned counsel in their able brief, as to the character of the evidence necessary to establish the relation of agency between husband and wife, and the authority of an agent to execute negotiable paper on behalf of his principal. We do not controvert these rules, but their application does not require that a new trial be granted where there is some evidence to sustain the verdict. It is proper that they be applied in weighing the evidence, and, where a trial is had before a jury, as in the instant case, it should be properly instructed in that regard. The record discloses that the jury was given proper and

specific instructions in these matters. It thereafter returned a verdict for appellee, which the trial court approved by overruling appellant's motion for a new trial. There was some evidence to sustain the verdict even in the light of these rules, and we must therefore adhere to the conclusion we have reached. We find no grounds for holding that the verdict is contrary to law.

Appellant also predicates error on the action of the court in refusing to permit the witness, James A. Roper, to answer the following question: "Tell the court and jury all the facts and circumstances of the transaction in which the note in suit was given?"

It is a well-recognized rule that, if the ruling of the trial court in excluding evidence can be sustained for any reason, it will not be ground for reversal

10. on appeal. *Baldwin v. Threlkeld* (1893), 8 Ind.

App. 312, 34 N. E. 851, 35 N. E. 841; *Leach v. Dickerson* (1895), 14 Ind. App. 375, 42 N. E. 1031; *Haas v. Cones Mfg. Co.* (1900), 25 Ind. App. 469, 58 N. E. 499; *Gray v. Good* (1909), 44 Ind. App. 476, 89 N. E. 498.

The question under consideration is objectionable because it calls for a conclusion of the witness as to what facts and circumstances were involved in

11. the transaction about which inquiry was made, rather than what was said and done with reference thereto. To have permitted the witness to answer the same might have prevented appellee from excluding incompetent and irrelevant evidence by interposing timely objections.

A trial court must be permitted to exercise large discretion in controlling this element of practice, and

Roper v. Cannel City Oil Co.—88 Ind. App. 637.

its action, unless plainly an abuse of discretion prejudicial to the complaining party, will not be reviewed on appeal. *Clark v. Field* (1880), 42 Mich. 342, 4 N. W. 19; *Pumphrey v. State* (1909), 84 Neb. 636, 122 N. W. 19, 23 L. R. A. (N. S.) 1023, 18 Ann. Cas. 979. Moreover, the offer to prove made by appellant involved, among other things, the witness's interpretation of certain written instruments not before the court. To this extent the offered evidence was not competent. It has been held that the only offer upon which error can be successfully alleged is one which contains no incompetent evidence. *Indianapolis, etc., Transit Co. v. Hall* (1905), 165 Ind. 557, 76 N. E. 242. We therefore conclude that appellant's contention respecting the exclusion of the offered evidence cannot be sustained.

The motion for a new trial contains other reasons in support thereof, which are not considered, as appellant has waived the same by failing to make

14. any specific reference thereto in his propositions or points, as required by the rules governing the preparation of briefs. *Buffkin v. State* (1914), 182 Ind. 204, 106 N. E. 362; *Merchants' Nat. Bank v. Nees* (1916), 62 Ind. App. 290, 110 N. E. 73, 112 N. E. 904.

We find no reversible error in the record. Judgment affirmed.

NOTE.—Reported in 121 N. E. 96.

Oolitic Stone Mills Co. v. Cain—68 Ind. App. 646.

OOLITIC STONE MILLS COMPANY v. CAIN.

[No. 9,640. Filed June 27, 1918. Rehearing denied December 11, 1918.]

1. **APPEAL.—Waiver of Error.—Briefs.**—Where no point or proposition is stated in appellant's brief in regard to the alleged insufficiency of the complaint, the error, if any, in overruling the demurrer thereto is waived. p. 649.
2. **MASTER AND SERVANT.—Injuries to Servant.—Employers' Liability Act.—Assumption of Risk.**—The Employers' Liability Act, Acts 1911 p. 145, §8020a *et seq.* Burns 1914, eliminates the defense of hazards inherent or apparent in the employment, and abrogates the assumed-risk rule as to the particular risk of a fellow servant. p. 651.
3. **APPEAL.—Review.—Refusal of Instructions.**—In an action for personal injuries, it was not error to refuse requested instructions on the question of contributory negligence where that element, so far as involved, was fully and properly covered by other instructions given. p. 651.
4. **MASTER AND SERVANT.—Injuries to Servant.—Methods of Work.—Contributory Negligence.**—Where an employe of a quarry was injured by a falling stone which he was assisting in raising, he was not guilty of contributory negligence as a matter of law because he voluntarily chose a hazardous way of doing his work, where he was acting in the usual and customary manner in obedience to, and under the personal supervision of, his superintendent. p. 652.

From Monroe Circuit Court; *Robert W. Miers*, Judge.

Action by Marshal Cain against the Oolitic Stone Mills Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Batman, Miller & Blair, for appellant.

Rufus H. East and Edwin S. East, for appellee.

FELT, P. J.—Appellee recovered a judgment against appellant for damages for personal injuries received while working in a stone quarry. Issues were joined

by a complaint in one paragraph and an answer of general denial.

The errors assigned and relied on for reversal are:

(1) The overruling of appellant's demurrer to the complaint; (2) overruling the motion for judgment on the answers of the jury to the interrogatories, notwithstanding the general verdict; and (3) overruling appellant's motion for a new trial.

Omitting formal and uncontroverted allegations of the complaint, it shows that appellant is a corporation of this state, employing more than five men and engaged in the operation of a stone quarry; that appellee was on February 17, 1915, an employe of appellant, and while working in the line of his duty was injured as a result of the negligence of appellant, its agents and servants, by reason of certain defects, mismanagement, fault and omission of duty of the defendant, in this, that while working in line of his duty as such employe he was assisting other employes in placing on a truck certain stone slabs which had been sawed from a large block; in sawing the same defendant and its servants had negligently failed to saw the same entirely through; that it was necessary to place the slabs on the truck one at a time for the purpose of resawing them; "that on said date, plaintiff made a dog hole in the north end of one of said middle slabs, and one Robert Goings, a fellow servant of the plaintiff, then in the service of the defendant, employed by defendant as a hooker on said traveler, made a dog hole in the south end of said stone, but negligently and carelessly made said dog hole too small and shallow to allow the point of the dog to be securely drawn into the same, and said dog hole was insufficient and defective in that regard and was dan-

gerous to plaintiff and other employes, in this: that when the power of the traveler was applied to lift and handle said stone, the metal hook or dog was liable to pull out, and let the stone fall, on account of said defective and insufficient dog hole as aforesaid, and thus said stone would fall upon the plaintiff and injure him.

“The plaintiff says that he attached one of the dogs or metal hooks to the north end of said stone; and said fellow servant Goings attached the other dog or metal hook to the south end of said stone; that when the power of the traveler was applied to raise said stone, and when the same was raised, it was plaintiff’s duty, on account of the negligent failure of defendant to saw said stone entirely through, to strike the lower edge of said stone with a hammer to break it loose from the slab to which it was thus attached, and he was thus required to be near said stone to perform said duty, and plaintiff avers that when said stone had been raised by the traveler about two feet, he struck the same in a proper manner at the lower edge, to break the same loose from the one to which it was attached at the bottom as aforesaid, and while so doing, on account of the negligence of said defendant aforesaid, and on account of the negligence of his fellow servant aforesaid, and the defective and dangerous and insufficient dog hole aforesaid, said metal hook or dog instantly pulled out of said dog hole so made by said fellow servant in the south end of said stone, and thereupon said large slab of stone immediately fell from said dogs, and upon and against the plaintiff’s right leg, and thereby both bones in said leg were broken and crushed between the knee and ankle, and plaintiff was thereby crippled and disabled for life.”

No point or proposition is stated in appellant's brief in regard to the alleged insufficiency of

1. the complaint, and the error, if any, in overruling the demurrer to the complaint is thereby waived.

Under points and authorities appellant has stated four general, abstract propositions under the topic of error in overruling its motion for judgment on the answers of the jury to the interrogatories, but no facts or answers whatever are pointed out which tend to contradict the general verdict. It is stated that: "The answers to certain of the interrogatories contradict the general verdict," but such answers, if any there be, are not pointed out. Again it is stated that: "The answers to the interrogatories * * * on the question of contributory negligence are such as to preclude a recovery, and hence the court below should have so adjudged, notwithstanding the fact that the answers to some of the interrogatories were favorable to appellee."

No facts found by the jury in answers to the interrogatories are pointed out to sustain these general conclusions of the writer of appellant's briefs, and appellee earnestly contends that the briefs do not comply with the rules of the court, and that no question is duly presented as to the overruling of the motion for judgment on the answers to the interrogatories. In support of this contention appellee cites the following cases: *Palmer v. Beall* (1915), 60 Ind. App. 208, 110 N. E. 218, and cases therein cited; *Bray v. Tardy* (1914), 182 Ind. 98, 99, 105 N. E. 772.

It may be that a strict construction of appellant's briefs would compel us to hold that the error, if any, in overruling the motion for judgment on the an-

swers to the interrogatories is waived. However, appellee has set out in his brief certain answers to interrogatories not shown in appellant's briefs. Considering the briefs together, as we may do, it appears that the proposition relied on by appellant is that the answers conclusively show that appellee was guilty of negligence which contributed to his own injury.

We have examined the interrogatories and the answers, the substance of which are not fully set out in the briefs. They are not in irreconcilable conflict with the general verdict, but many of them are in harmony with and sustain it. Viewing the complaint as drawn on the theory of a cause of action based on the negligence of a fellow servant of appellee, and the defense of contributory negligence as available to appellant, the answers do not conclusively establish contributory negligence, but tend strongly to show freedom from contributory negligence.

They show that appellee was doing the work he was employed to do in the usual and customary way of performing the same in that quarry; that he was subject to the orders of the superintendent who was present just before and at the time of the accident which caused appellee's injury; that at the time of the injury appellee was performing his usual work in obedience to the direction of his foreman; that appellee and his fellow-workmen were engaged in moving a sawed slab of stone; that it was suspended about three feet by a traveler and found not to be completely separated from all of the other stone by the sawing but "burrs" or parts projected from the bottom of the slab; that to separate the same appellee struck the north end with a hammer, and then stepped up by the south end, and it fell because the dog hole

in the south end pulled out; that the striking did not cause "the dog" fastened to the south end of the block to gradually work out of the dog hole, and the same did not pull out because the slab was struck with the hammer; that the striking with the hammer only slightly jarred the suspended slab; that appellee did not know, and could not have ascertained by looking, that the dog hole in the south end of the slab was giving way prior to the time he "stepped up" by the south end of the slab.

We have considered all the interrogatories, and without setting out more of the answers hold that under the well-established rules applicable to such motions the trial court did not err in overruling the motion for judgment on the answers to the interrogatories. *Nordyke & Marmon Co. v. Hilborg* (1916), 62 Ind. App. 196, 205, 110 N. E. 684; *Standard Steel Car Co. v. Martinecz* (1918), 66 Ind. App. 672, 113 N. E. 244, 248, 114 N. E. 94; *S. W. Little Coal Co. v. O'Brien* (1917), 63 Ind. App. 504, 113 N. E. 465, 114 N. E. 96; *J. Wooley Coal Co. v. Tevault* (1918), 187 Ind. 171, 118 N. E. 921, 119 N. E. 485.

Under its motion for a new trial appellant complains of the refusal of the court to give instruction No. 12 tendered by it "on the question of contributory negligence."

The instruction deals with the subject of open and obvious dangers which the servant negligently fails to observe and as a result of which he is injured.

2. This case is founded on the Employers' Liability Act, Acts 1911 p. 145, §8020a *et seq.* Burns 1914. The act eliminates the defense
3. of dangers or hazards inherent or apparent in the employment, and abrogates the

assumed-risk rule as to the particular risk of a fellow servant. So far as the element of contributory negligence of appellee was involved, the jury was fully and properly instructed on the subject by other instructions. The court therefore did not err in refusing to give instruction No. 12. *Nordyke & Marmon Co. v. Hilborg, supra*, 202; *Chicago, etc., R. Co. v. Mitchell* (1916), 184 Ind. 588, 110 N. E. 680.

We have examined the instructions given and those tendered and refused, and find no error prejudicial to appellant in the giving or refusal of instructions.

Appellant also urges that appellee is conclusively shown to have been guilty of contributory negligence in voluntarily choosing a hazardous way of doing his work when another and a safer way was open to him.

There is ample evidence tending to prove that appellee was doing his work in the usual and customary way that such work had been done in that

4. quarry for many months prior to his injury, and that he was at the time obeying an order of his superintendent, who was at the time present, saw and knew how the work was being done, made no objection thereto, and gave no warning to appellee of danger because of the way he was doing his work. Furthermore, in answer to an interrogatory the jury found that, though the work appellee was doing when injured could have been done in the manner suggested by appellant at the trial, such way was not the customary way of doing that kind of work in that quarry, and was not a safe way of performing the same.

Other questions of a kindred nature to those above considered are suggested in appellant's briefs, by general propositions, which are not specifically applied to any particular question or error urged as

H. K. Toy, etc., Co. v. Richards—68 Ind. App. 653.

cause for reversal. The questions so suggested have been decided adversely to appellant's contentions in cases arising under the statute, *supra*, and no good purpose would be subserved by further discussion of them in this opinion.

Considering the issues involved and the law applicable to the case, it seems to have been fairly tried, and, so far as the record discloses, a correct result was reached. No error prejudicial to any substantial right of appellant has been duly pointed out, and no cause for reversal of the judgment is shown. §700 Burns 1914, §658 R. S. 1881; *Vandalia R. Co. v. Stevens* (1918), 67 Ind. App. 238, 114 N. E. 1001, 1008; *Timmons v. Gochenour* (1918), 69 Ind. App. 295, 117 N. E. 279, 282; *City of Decatur v. Eady* (1917), 186 Ind. 205, 115 N. E. 577, 580, L. R. A. 1917E 242.

There is evidence tending to support the verdict.

The court did not err in overruling the motion for a new trial. Judgment affirmed.

Caldwell, C. J., Ibach, Dausman and Hottel, JJ., concur.

Batman, J., not participating.

NOTE.—Reported in 119 N. E. 1005.

H. K. TOY AND NOVELTY COMPANY v. RICHARDS.

[No. 9,872. Filed October 10, 1917. Rehearing denied December 20, 1917. Transfer denied December 11, 1918.]

1. MASTER AND SERVANT.—*Workmen's Compensation Act*.—*Amount of Award*.—Section 31, subd. a, of the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, specifying compensation for the loss by separation of "not more than two phalanges of a finger" applies where only one-eighth of an inch

H. K. Toy, etc., Co. v. Richards—68 Ind. App. 653.

of the first phalange is lost and the injured servant is entitled to the compensation provided therein. p. 655.

2. **MASTER AND SERVANT.—Workmen's Compensation Act.—Construction.—Amount of Award.—Discretion of Industrial Board.**—The court on an appeal from the Industrial Board has no discretion as to the amount of compensation as specified in the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, and it is immaterial that an injury did not seriously impair the employe's working power or that the employe was able to return to work within a short time after the injury. p. 656.

From the Industrial Board of Indiana.

Proceedings for compensation under the Workmen's Compensation Act by Murrel B. Richards against the H. K. Toy and Novelty Company. From an award for applicant, the defendant appeals. *Affirmed.*

Henley & Joseph, for appellant.

Emsley W. Johnson and Joseph W. Hutchinson, for appellee.

BATMAN, J.—Appellee filed her claim against appellant before the Industrial Board of Indiana, under the Workmen's Compensation Act of 1915, alleging that on August 30, 1916, she received personal injuries by reason of an accident arising out of and in the course of her employment by appellant. On a hearing before the full Industrial Board, appellee was awarded compensation at the rate of \$5.50 per week, for a period of fifteen weeks. Appellant appealed and assigned errors on which it seeks a reversal. The evidence tends to establish the following facts, pertinent to the questions presented for our determination. On August 30, 1916, appellee was in the employ of appellant in the city of Indianapolis, Indiana, cutting paper for boards for use in its factory, for which she received an average weekly wage of \$7.20. The

cutting was done by a machine, operated by appellee by means of a foot pedal, and into which she fed the paper by hand. While performing her work on said date, appellee's middle finger on her left hand was caught by the knife of the machine which she was operating, resulting in the loss by separation of a part of said finger, near the base of the nail, including one-eighth of an inch of the first phalange thereof.

The award by the Industrial Board was evidently under subdivision (a) of §31 of the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.*

1. Burns' Supp. 1918. This section provides in part as follows: "For injuries in the following schedule the employee shall receive in lieu of all other compensation a weekly compensation equal to fifty-five per cent. of his average weekly wages for the periods stated against such injuries respectively, to-wit: (a) For the loss by separation of not more than one phalange of a thumb or not more than two phalanges of a finger 15 weeks." Appellant contends that subdivision (a) of said section is only applicable, when substantially two phalanges of a finger are lost by separation, and that, inasmuch as only a small portion of the first phalange of appellee's finger was thus lost, the provision for compensation for fifteen weeks does not apply. We cannot concur in this contention. The language of the act forbids it. It should be noted that the subdivision in question does not read *not less than two phalanges or substantially two phalanges*, but reads "not more than two phalanges." A fair and reasonable construction of the language used makes it apparent that the loss by separation of the whole of the distal and middle phalanges of a finger, or any mate-

rial fraction thereof, entitles an employe to compensation for fifteen weeks. While the loss by separation of only one-eighth of an inch in length of the distal phalange of a finger may appear to be a small fraction thereof, it should be remembered that the loss by separation of any portion in length of such phalange necessarily removes the muscular cushion on the end thereof, and thereby seriously interferes with the use of such finger. This fact may have had its influence with the legislature in wording the clause under consideration in such manner as to give fifteen weeks' compensation "for the loss by separation of not more than * * * two phalanges of a finger."

The fact that the function of appellee's finger is not seriously impaired, if it be a fact, and that she was able to return to work within a short time

2. after the injury can have no influence on our interpretation of the statute in question. Its provisions may appear too liberal in some instances, and not liberal enough in others, but with this the Industrial Board and this court has nothing to do. The legislature in its wisdom did not see fit to limit compensation for fifteen weeks to cases where substantially two phalanges were lost by separation, nor where the function of the finger was seriously impaired, nor where the actual loss of time was for any definite period; and neither the Industrial Board nor this court has a right to read such provisions into the act. Appellant has cited a number of cases in support of its contention, all of which we have examined with care. Some of them are decisions under compensation acts where the language is materially different from the act of this state, and none are in serious conflict with the conclusion we have reached.

Cleveland, etc., R. Co. v. Sammons—88 Ind. App. 657.

Appellant also contends that the award of the Industrial Board is erroneous, being too large, and that its decision is contrary to law. It bases these contentions on a claim that the compensation under the facts proved should be based on the actual disability, and not on the loss by separation of not more than two phalanges of a finger, and that therefore the award is too large and is contrary to law. In view of the conclusion we have heretofore reached, that subdivision (a) of §31 of the Indiana Workmen's Compensation Act, *supra*, is applicable to the facts which the evidence tends to establish, such contentions are not well taken.

Finding no available error in the record, the award is affirmed.

NOTE.—Reported in 117 N. E. 230. Workmen's compensation: loss of finger, amount of award, L. R. A. 1917D 167.

CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS
RAILWAY COMPANY v. SAMMONS.

[No. 9,558. Filed October 8, 1918. Rehearing denied November 7, 1918. Transfer denied December 11, 1918.]

1. TRIAL.—*Verdict.*—*Special Interrogatories.*—Answers to interrogatories will not overthrow the general verdict unless there is such irreconcilable conflict that both may not stand, every presumption being in favor of the general verdict. p. 663.
2. TRIAL.—*Special Interrogatories.*—*Motion for Judgment.*—*Evidence.*—*Presumptions.*—Where, in an action against a railroad company for injuries sustained in a crossing accident, the general verdict was for the plaintiff, and the jury by answers to special interrogatories found that there was a light on the tender approaching the plaintiff and that the plaintiff backed into the engine in getting out of the way of another train, and the

Cleveland, etc., R. Co. v. Sammons—68 Ind. App. 657.

defendant moved for judgment on the special answers, evidence having been admissible to show that the "light" was not lighted and that there was much confusion at the time and place of the accident, the presumption on appeal, in support of the general verdict, is that such evidence was introduced. p. 663.

3. **RAILROADS.—Injuries to Persons on Tracks.—Presumptions.**—A person crossing a railroad track at a street crossing may, in the absence of notice to the contrary, rely on the presumption that the railroad company will obey the city ordinances. p. 664.
4. **TRIAL.—Motion for Judgment on Answers to Interrogatories.—Evidence.—Admissibility.**—In a personal injury action against a railroad company, where the complaint alleged that the defendant negligently ran its engine over the plaintiff, and the jury by answers to special interrogatories found that there was an unobstructed view of the crossing for a distance of sixty feet, that the engine could have been stopped within fifteen feet, and that the plaintiff stood on the track probably a minute, the court on appeal will presume, in support of the general verdict, that evidence was introduced in support of the doctrine of last clear chance, which applied under the facts found by the special answers. p. 664.
5. **RAILROADS.—Injury to Persons.—Last Clear Chance.**—In a personal injury action against a railroad company for injuries sustained by the plaintiff in a crossing accident, where the facts were such that the doctrine of last clear chance was applicable, the negligence of the plaintiff in stepping on the track became immaterial. p. 664.

From Marion Superior Court; *John J. Rochford*, Judge.

Action by Frank Sammons against the Cleveland, Cincinnati, Chicago and St. Louis Railway Company. From a judgment for the plaintiff, the defendant appeals. *Affirmed*.

W. H. H. Miller, Frank L. Littleton, S. D. Miller, F. C. Dailey and W. H. Thompson, for appellant.

Little & Little and Frank S. Roby, for appellee.

IBACH, J.—Appellee recovered a judgment against appellant for damages on account of personal injuries sustained through its alleged negligence.

With their general verdict the jury returned answers to interrogatories. Appellant's motion for judgment on these answers was overruled, and this ruling presents the only question we are called upon to determine by this appeal.

In our consideration of such question we are confined to the issues, which in this case consisted of a single paragraph of complaint and general denial thereto, the general verdict, and the answers to interrogatories.

In answer to interrogatories the jury found, so far as material to the contentions made by appellant, in substance, as follows: The accident occurred at the crossing of Miley avenue and the tracks of the appellant company and the Cincinnati, Hamilton and Dayton Railway Company in the city of Indianapolis, on January 3, 1913. There were four tracks at this crossing. The first track from the north was what is known as the "running track," the second track was the out or west-bound main track, and the third was the in or east-bound main track, and the fourth what is known as the old "C., H. & D. track." The distance between the south and north rails of the first two tracks was sixteen feet, between the south and north rails of the second and third tracks twenty-four feet. Appellee had been a locomotive engineer for about ten years and was familiar with the surroundings of the crossing in question. He had passed over this crossing a great many times on foot and also while operating a locomotive engine. In his experience appellee had operated a yard engine in the city of Indianapolis, and knew prior to the time of the accident that a train or engine might approach from either direction on the running track

at any moment. He had frequently seen locomotive engines pass in both directions on said running track. Appellee was struck by a locomotive engine while he was standing on or near said north or running track. He approached the tracks from the north on the east sidewalk of Miley avenue. The accident occurred about six o'clock in the evening. As he approached the crossing a Big Four passenger train was on the inbound track starting to move across the crossing and a C., H. & D. passenger train east of the crossing backing west on the outbound track. This train was about 200 feet away when appellee was struck. From a point within six feet from the crossing the view of the running track was unobstructed for several hundred feet west of said avenue. Appellee saw the car next to the engine of the passenger train on the inbound track, and the head of the engine was at or near the west line of Miley avenue. Appellee was facing south at the time he was struck, and was struck in the right side. The engine was equipped with an automatic bell, and it had been started to ringing prior to the time of the accident, and was ringing at the time it approached Miley avenue. The engine was moving eastward over the running track with the tender forward. Interrogatory No. 40: "Was there a light on the tender of said engine at and prior to the time of the accident in question which *when lighted* threw its rays in the direction said engine was moving? Answer. Yes." Just prior to his injury appellee stepped backward toward or upon the running track. He would have been in a place of safety with respect to said locomotive engine north of said running track if he had remained north of said track a distance of three feet or more. There

was nothing to prevent appellee standing between the north track and the outbound main track. Appellee at the time of the accident was twenty-nine years old and was in full possession of his faculties of sight and hearing. Darkness would have prevented appellee from seeing the approach of the locomotive, if he had looked when he was on or near the running track. If he had looked to the west along the running track when the locomotive was at the west line of Miley avenue, he could have seen the locomotive in question. Miley avenue was sixty-six feet in width from property line to property line. The locomotive engine on the inbound track was equipped with an electric headlight, which was burning at the time of the accident. The locomotive engine which collided with appellee blew one long and two short blasts of the whistle before it reached Miley avenue, for the purpose of advising the tower-man of its approach. The accident in question occurred as the result of appellee stepping backward upon the running track and thereby colliding with said engine. Appellee stopped on or near the running track, watching the passenger train on the inbound track moving across said avenue, a few seconds—probably a minute. Just prior to the injury appellee could see in a westerly direction along the running track about sixty feet. Interrogatory No. 69: "Did the man in the K. D. station—one block east of Miley avenue—see the headlight of said engine before it reached Miley avenue? Answer. Yes." When the engine collided with appellee, it was moving at from five to seven miles an hour. If appellee had looked to the west just prior to stepping on the running track, he could have seen to the west about sixty feet. If appellee had looked to the west

when the locomotive was twenty-five feet west of the point where the collision occurred, nothing would have prevented him from seeing the locomotive. Said locomotive engine could have been stopped at the rate of speed it was running in about fifteen feet. The engineer, was on the north side of the engine at and prior to the time of the collision, and the fireman was on the south side.

The charging part of the complaint is in substance as follows: On January 3, 1913, appellee was walking south on Miley avenue, and was compelled to cross over appellant's tracks. Before he attempted to cross said tracks, he looked and listened for the approach of trains, and continued to look and listen for trains approaching said highway. When he reached the crossing, it was blocked by appellant's passenger train, which was at the time going westward on the west-bound main track. After waiting for the passenger train to clear the highway, and while exercising due care and diligence for his own safety, appellant negligently and carelessly ran one of its engines into, upon and over appellee on its track immediately north of the track upon which the passenger train was passing. Appellant negligently ran said engine backwards in and through said city, without providing a watchman or other person on the rear end of the locomotive to warn persons of its approach, contrary to and in violation of §11 of an ordinance passed and adopted by the common council of the city of Indianapolis and approved March 12, 1886, and which ordinance was on said date in full force and effect; that appellant negligently ran its engine backward at said time and place without giving any notice of its approach, and negligently failed to ring the bell,

in violation of §1 of said ordinance. That appellant negligently ran its engine between the hours of sunset and sunrise without displaying sufficient lights on the same at the time it was approaching said crossing contrary to and in violation of §11 of said ordinance. Appellee had no knowledge of the approach of said engine; that he heard no whistle, bell, or other signal of warning; that no light was visible on said engine. At the time he was struck he was using due care and caution for the approach of engines and trains of cars of appellant. That by reason of such negligence he was injured, etc. .

It is well settled that answers to interrogatories will not overthrow the general verdict, unless there is such irreconcilable conflict that both cannot

1. stand. Every presumption is in favor of the general verdict, and no inferences or inferences are to be drawn in favor of the special answers.

Appellant contends that the special findings clearly and undisputedly show contributory negligence upon the part of appellee, and therefore its motion should have been sustained. This claim of appellant is in effect conceding that it was guilty of negligence, and appellee should be entitled to recover if he was not guilty of contributory negligence.

As bearing on the question of contributory negligence, counsel for appellant in their brief and on oral argument contended that the answers to inter-

2. rogatories show that there was a light on the tender of the engine at and prior to the time of the accident, which threw its rays in the direction the engine was moving, and that this light was seen by the tower-man, one block east of Miley avenue, before the engine reached said avenue. In support

of the general verdict, and, as against the answers, as disclosed by the record, evidence was admissible to show that, while there was a "light" on the rear end of the locomotive and tender, it was not lighted at the time. Evidence was also admissible to show that there was a great deal of confusion at this particular crossing at this particular time. The

3. answers show that appellee stepped backward on the running track just prior to his injury. In the absence of notice to the contrary appellee had a right to rely on an obedience of the city ordinances. Moreover appellee may have been called to look in other directions from that of the approaching engine until it was too late to get out of its way. Under the peculiar circumstances, these questions, as well as that of proximate cause, were for the jury, and which they have answered by their general verdict in favor of appellee.

Furthermore, the complaint charges that appellant negligently and carelessly ran one of its engines into, upon and over appellee. The answers to inter-

4 rogatories show that the engine could have been stopped in fifteen feet, that there was an unobstructed view of the crossing for a dis-

5. tance of sixty feet from the direction the engine was approaching, and that appellee stood on the track probably a minute. Evidence was therefore admissible to show that appellant's servants knew of appellee's perilous situation, or should have known, and that the doctrine of last clear chance applied. *Picken v. Müller* (1915), 59 Ind. App. 115, 108 N. E. 968. In such event it would make no difference if appellee was guilty of negligence in stepping on the track.

City of Huntingburg v. Fisher—68 Ind. App. 665.

We conclude that the answers to the interrogatories are not in such conflict with the general verdict as not to be removable by evidence admissible under the issues, and therefore the court did not err in overruling the motion for judgment thereon.

Judgment affirmed.

NOTE.—Reported in 120 N. E. 389. Last clear chance, applicability of doctrine where dangers are not actually discovered. 55 L. R. A. 418, 38 L. R. A. (N. S.) 967. See under (3, 4) 33 Cyc 1027, 1047.

CITY OF HUNTINGBURG v. FISHER.

[No. 9,630. Filed June 5, 1918. Rehearing denied December 12, 1918.]

1. **APPEAL.—Review.—Evidence.—Sufficiency.**—Where there is evidence tending to sustain the finding of the trial court on all material questions, the finding will not be disturbed on appeal for insufficiency of evidence. p. 668.
2. **EVIDENCE.—Records.—Admissibility.—Authentication.—Statutes.**—In view of §§3250, 3251 R. S. 1881 and §§8901-8903 Burns 1914, Acts 1905 p. 383, Acts 1901 p. 348, relating to the adoption, recording and authentication of surveys and plats of cities and towns, a loose paper, claimed to be a town plat, was properly excluded from evidence in an action to quiet title, even though found among the city records, where there was no proof that it had been signed by any one, that it was a duly authorized, executed and recorded plat in accordance with the statutes, or how or by what authority it had been placed with the records of the city. p. 668.
3. **NEW TRIAL.—Grounds.—Newly-Discovered Evidence.—Diligence.—Showing.**—In an action to quiet title, a new trial on the ground of newly-discovered evidence, consisting of a deed, will not be granted, where the showing made indicates that the deed was found of record in the county recorder's office, where it had been for many years and no facts are alleged to show any effort to obtain such evidence before trial, though defendant was in possession of such information as would put it on inquiry. p. 669.

From Dubois Circuit Court; *Edward P. Richardson*, Special Judge.

Action by Wilhelmina Fisher against the city of Huntingburg. From a judgment for plaintiff, the defendant appeals. *Affirmed*.

A. L. Grey, for appellant.

Leo H. Fisher, for appellee.

FELT, J.—Appellee brought this suit against appellant, the city of Huntingburg, Indiana, to quiet her title to a strip of ground about thirteen feet in width lying between the south line of Sixth street in the city of Huntingburg, Dubois county, Indiana, and the north line of outlot No. 3 of the original plat of said town, now city, aforesaid.

The complaint, in the usual form to quiet title to real estate, was answered by a general denial. The case was tried by the court, and a general finding made in favor of appellee, on which judgment was rendered quieting her title to the real estate described in her complaint.

Appellant's motion for a new trial was overruled. The only error assigned and relied on for reversal is the overruling of the motion for a new trial.

Appellant assigned as causes for a new trial that the decision of the trial court is not sustained by sufficient evidence, that it is contrary to law; that the court erred in the exclusion of certain evidence; that a new trial should have been granted on account of newly-discovered evidence.

Appellant's briefs do not clearly point out the particular error relied on for reversal, but, considering the same in connection with appellee's briefs, we are able to ascertain that the main contention of appel-

lant is that appellee wholly failed to offer any evidence tending to sustain the material allegation of the complaint that she is the owner of the real estate therein described; that the same was and is a part of Sixth street which runs along the north boundary of the city, and appellee has failed to present any evidence which authorized the finding made by the trial court.

Appellant contends that the original plat of the town included the land in controversy in Sixth street, and that the filing of the plat was a sufficient dedication of the ground by appellee's predecessors in title to defeat any claim of appellee to ground in controversy.

There is evidence tending to show that the original plat is lost, does not appear of record, and cannot be found; that such plat had been seen by persons who testified that it did not show a street located on the north side of the original town; that subsequent plats made by authority of the city council show that the strip of ground in controversy is not a part of Sixth street, but is in the possession of appellee, and has been in her possession and use, and in the open, notorious, continuous, adverse possession of appellee's predecessors in title for more than forty years under a claim of ownership; that during that time improvements were placed and maintained thereon, consisting of a fence along the north line of said strip, barns, sheds, trees, a garden plot and other improvements; that the city at no time asserted any claim to or dominion over said strip as a public street until about two years prior to the trial of this case.

The evidence tends to sustain the finding of the trial court on all material questions, and on appeal

this is sufficient. We cannot therefore sustain

1. the contention that the finding of the trial court is not sustained by sufficient evidence, nor hold that it is contrary to law.

Appellant also complains of the ruling of the trial court in refusing to receive in evidence a certain loose leaf alleged to be a plat of the "Town of Huntingburg."

In offering the paper appellant's council stated: "There is a loose leaf here marked Huntingburg. It seems similar paper. It may belong to the
2. book. Not sure. It is rather ragged, loose, out of the record. Not the same shape of the pages any more." Proof was also offered to show that the paper offered in evidence had been found among the records of the city, but there was no proof that it had been signed by anyone, or that it was a duly authorized, executed and recorded plat in accordance with the provisions of the statutes of this state. The evidence in fact shows that it had not been signed or executed by anyone. There was no showing as to how or by what authority it had been placed with the records of the city. On the showing made it possessed no probative value whatever. It was only a "scrap of paper" or a private drawing or memoranda of some unidentified person. Therefore the court did not err in excluding it from the evidence. §§3250, 3251 R. S. 1881; §§8901, 8902, 8903 Burns 1914; Acts 1905 p. 383, Acts 1901 p. 348; *Taylor v. City of Fort Wayne* (1874), 47 Ind. 274; *Waltman v. Rund* (1887), 109 Ind. 366, 10 N. E. 117.

After the time for filing the motion for a new trial had expired appellant filed a supplemental motion

based on certain newly-discovered evidence.

3. The evidence consisted of a deed for an outlot in the same addition as the lot of appellee, made to a third party in 1842 by the person who laid out the original town of Huntingburg, in which deed reference was made to a street thirty feet wide on the north side of the town, which appellant contends would cover the strip in controversy here. The showing made indicates that the deed was found of record in the recorder's office, where it had been for many years. Waiving all other questions concerning the supplemental motion and the admissibility of such deed in evidence, it is sufficient to say that the showing of diligence is insufficient to entitle appellant to a new trial on account of the alleged newly-discovered evidence. There is no showing that any effort had been made to obtain such evidence prior to the trial or prior to the expiration of the time for filing the motion for a new trial.

The public records revealed the name of the person who laid out and platted the original town, and they were open to inspection at all times.

Appellant had the same opportunity before, as after, the trial to search the records for any evidence pertinent to the issues of the case.

The fact that it may have gained information, by accident, or incidentally, without such search, does not excuse the lack of diligence. New trials are only granted on the ground of newly-discovered evidence where due diligence is shown in trying to obtain the evidence, or in cases where the circumstances are such as to clearly excuse the failure to discover the evidence in time to use it at the trial.

Here there is no showing of an effort to discover

the evidence before the trial, though appellant was in possession of such facts as would put it upon inquiry and indicate the possibility of obtaining such evidence by searching the public records. *Hines v. Driver* (1885), 100 Ind. 315; *Morrison v. Carey* (1891), 129 Ind. 277, 28 N. E. 697; *McDonald v. Corryell* (1893), 134 Ind. 493, 34 N. E. 7.

The court did not err in overruling the motion for a new trial.

The case seems to have been fairly tried on its merits, and a correct result reached. No error prejudicial to any substantial right of appellant has been pointed out. §700 Burns 1914, §658 R. S. 1881.

Judgment affirmed.

NOTE.—Reported in 119 N. E. 837.

VANDALIA COAL COMPANY v. HOLTZ.

[No. 10,255. Filed October 11, 1918. Rehearing denied December 13, 1918.]

1. MASTER AND SERVANT.—*Workmen's Compensation Act*.—*Award*.—*Findings*.—*Notice of Injury*.—In a proceeding for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, by a coal miner who lost the sight of an eye through injury, but gave no notice to the employer, as required by §22 of the act, a finding by the Industrial Board that defendant's foreman under whom applicant worked had actual knowledge of the accident a few minutes after it occurred, that applicant visited defendant's physician and surgeon, who informed him, after examining the injured eye, that the injury was trivial and required no treatment, and that, relying upon such advice, applicant did not give written notice to defendant, sustained an award of compensation on the ground that the employer's agents and representatives had actual knowledge of

Vandalla Coal Co. v. Holtz—68 Ind. App. 670.

the injury at the time it occurred and that a reasonable excuse for failure to give notice existed. p. 676.

2. MASTER AND SERVANT.—*Workmen's Compensation Act.—Findings by Industrial Board.—Conclusiveness.*—In a proceeding for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, the Industrial Board having found facts showing actual knowledge of the injury involved by the employer's agents and representatives, and also reasonable excuse for failure to give statutory notice, such findings are conclusive on appeal, if there is any evidence to sustain either. p. 676.
3. MASTER AND SERVANT.—*Workmen's Compensation Act.—Findings of Fact.—Sufficiency of Evidence.*—In a proceeding for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, evidence held sufficient to sustain findings by the Industrial Board that the employer's agents had knowledge of the injury, and that a reasonable excuse for failure to give statutory notice was shown. p. 676.
4. MASTER AND SERVANT.—*Workmen's Compensation Act.—Notice of Injury.—Knowledge of Foreman.*—Where the employer's foreman or pit boss had knowledge of the injury suffered by claimant for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, at the time disability resulted therefrom, the employer had sufficient notice of the injury under the act. p. 678.

From the Industrial Board of Indiana.

Proceedings for compensation under the Workmen's Compensation Act by Fred Holtz against the Vandalla Coal Company. From an award for applicant, the defendant appeals. *Affirmed.*

Davis, Moore, Cooper, Royse & Bogart and *F. J. Crawford*, for appellant.

A. G. Cavins and *D. W. McIntosh*, for appellee.

FELT, P. J.—This is an appeal from an award of the full Industrial Board, allowing appellee, Fred Holtz, compensation for 100 weeks at the rate of \$13.20 per week beginning June 26, 1917.

Appellant has assigned as error that said award

“is contrary to law because it is not supported by the evidence.”

Appellant contends that appellee did not give notice of his injury as required by the Indiana compensation law, and that sufficient reason for such failure is not shown by the evidence to sustain the award; that the rights of appellant were prejudiced by such failure of appellee to give due notice of his injury.

Appellee was denied an award at the first hearing of his application, but, on review by the full board, a finding and award were made as follows:

“The evidence introduced upon the original hearing of this cause having been transcribed and having been reviewed by the full board in connection with the consideration of the evidence introduced upon the hearing upon review, the full board being duly advised in the premises finds that during the month of May, 1916, and for more than a year prior thereto and continuously thereafter until the 26th day of June, 1917, plaintiff was in the service of defendant as an employe as an electrical machine operator in the defendant’s coal mine No. 9 in Greene County, State of Indiana, at an average weekly wage in excess of \$24.00; that during all of said time the plaintiff worked under the defendant’s pit boss as general foreman who had control of and directed the plaintiff as to what work he should perform, and during all of said time the plaintiff also was under the control and charge of the defendant’s chief electrician as machine foreman, who directed and controlled the plaintiff in the manner of operating his electrical machine.

“That in the month of May, 1916, on a date in said

month not shown by the evidence, the plaintiff was engaged in the discharge of his duties in operating the electrical machine and while operating said machine in the regular and usual course of his work and in the discharge of the duties of his employment, plaintiff was accidentally struck in the right eye by a flying particle, as a result of which from and after the 26th day of June, 1917, the vision of plaintiff's right eye has been permanently and irrecoverably reduced below one-tenth of normal with glasses; that the defendant's chief electrician or machine foreman, under whom the plaintiff worked had actual knowledge of the plaintiff's injury on the day that it occurred and within a few minutes thereafter; that continuously from the first day of September, 1915, and until the date of the original hearing of this cause, Dr. A. A. Thomas, of Linton, Indiana, was in the employment of the defendant as its physician and surgeon for the treatment of the injuries of all employes of the defendant injured at said mine No. 9; that soon after the 1st day of September, 1915, and prior to the plaintiff's injury, the defendant notified the plaintiff, by inserting in his pay envelope a written notice, that in case of a slight injury he was to report to Dr. A. A. Thomas, the Company surgeon of Linton, Indiana, for treatment and in case he should receive an injury that rendered him unable to report in person, he should call Dr. Thomas at once.

"That pursuant to said notice the plaintiff visited Dr. Thomas in his office in the city of Linton, Indiana, on the day of his injury, at which time the said Dr. Thomas examined the plaintiff's eye and advised him

that the injury was trivial, that it required no treatment and that in a short time he would be recovered from the injury; that relying upon said advice by said physician the plaintiff did not notify the defendant in writing at any time of his injury and did not give any verbal notice to the pit boss; that the plaintiff continued his work for the defendant until the 26th day of June, 1917; that during the whole of said time the plaintiff suffered from his eye but relied upon the advice of the defendant's surgeon that in time he would have a recovery from his injury; that on the 26th day of June, 1917, plaintiff discontinued his work, caused his eye to be examined by an oculist and was advised that he had permanently and irrecoverably lost the entire vision of said eye; that the plaintiff acted in good faith upon the advice of the defendant's surgeon and because of said advice the plaintiff's failure to give written notice to the defendant of his injury is founded upon a reason equally as good as if he had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person; that in view of the fact that the plaintiff acted upon the advice of the defendant's agent and physician in the matter of his injury, the rights of the defendant have not in any wise been prejudiced by the failure of the plaintiff to give to the defendant written notice of his injury; that the accident resulting in the loss of the vision of the plaintiff's right eye arose out of and in the course of the plaintiff's employment with the defendant; that by and through its chief electrician and its physician the defendant had actual knowledge of the plaintiff's injury upon the date that it occurred.

“Award.

“It is therefore considered and ordered by the full Industrial Board that the plaintiff be and is hereby awarded against the defendant one hundred weeks’ compensation at the rate of \$13.20 per week, beginning on the 26th day of June, 1917.”

Section 22 of the Workmen’s Compensation Act (Acts 1915 p. 392, §80201 *et seq.* Burns’ Supp. 1918) provides that: “Every injured employe or his representative shall immediately upon the occurrence of an injury or as soon thereafter as practicable give or cause to be given to the employer written notice of the injury and the employe shall not be entitled to physician’s fees nor to any compensation which may have accrued, under the terms of this act, prior to the giving of such notice: unless it can be shown that the employer, his agent or representative had knowledge of the injury or death, or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person, or for equally good reason: but no compensation shall be payable unless such written notice is given within thirty days after the occurrence of the injury or death, unless reasonable excuse is made to the satisfaction of the Industrial Board for not giving such notice.”

Section 23 of the act, *supra*, states what the written notice shall contain, and then provides that: “No defect or inaccuracy in the notice shall be a bar to compensation unless the employer shall prove that his interest was prejudiced thereby, and then only to the extent of such prejudice.”

The findings sustain the award on two grounds,

viz.: (1) That appellant's agents and representatives had actual knowledge of the injury at the time
1. it occurred; and (2) that a reasonable excuse is shown for the failure of appellee to give the notice required by the statute.

There is no claim that any written notice was given by appellee to appellant, and the provisions of §23 of the act, *supra*, have no application.

The board having found the facts showing actual knowledge of the injury, by appellant's agent and representatives, at the time it occurred, and
2. also reasonable excuse for the failure to give the statutory notice, such findings are conclusive and binding on this court, if there is any evidence tending to sustain either of such findings.

There is evidence tending to prove that appellee was injured in the month of May, 1916, substantially as found by the Industrial Board; that his eye

3. pained him, and thereafter he noticed something like gnats or black specks in front of him, but he continued to work until June 26, 1917; that he consulted Dr. A. A. Thomas, the company's physician, on the evening of the day he was injured; that the doctor examined his eye, informed him the injury would not amount to anything, and did not treat it; that on the day of the injury appellee placed a bandage over his injured eye, and on that day the company's head electrician, who directed appellee in the operation of the machine used by him in the mine, noticed his eye was bandaged and asked what was the matter, and appellee showed him his injured eye, and he remarked it was a pretty bad looking eye; that he did not report his injury to the general foreman or pit boss, or to anyone else, except as above

stated; that subsequently his eye bothered him, but he continued to work, and suffered more or less from the injury from the time it occurred until June, 1917, when the eye became worse, and he then consulted Drs. Johnson and Knapp, who subsequently treated his eye; that after appellee consulted Dr. Knapp he reported to the mine boss, the foreman of the mine where he worked, that he was unable to work, and showed him his eye; that he looked at it, and said, "I guess not," and informed him his job was ready for him when he got able to work.

Appellant offered in evidence a notice, which it claimed appellee and other employes received, stating that its employes were requestd to report at once to the pit boss or section foreman any injury, however slight, and were also requested to report in person to Dr. A. A. Thomas, company surgeon, for treatment, or have him called when necessary.

The evidence justifies the findings of the board. It tends to prove that agents and representatives of appellant had knowledge of the injury, both at the time of the accident in the mine, and at the time the injury was ascertained to be of such a serious nature as to incapacitate appellee from working in the mine.

It tends also to show that he consulted the appellant's physician promptly, followed his suggestion, and relied upon his statement until the condition of his eye became serious, when he consulted other physicians.

The Industrial Board found that the facts afforded a reasonable excuse for not giving the notice prescribed by the statute. The thirty days therein prescribed expired while appellee was relying upon the opinion of appellant's physician that his injury was

slight and would have no permanent effect upon his eye. He seems to have acted in good faith, and the facts of the case not only sustain the finding of the Industrial Board, but clearly illustrate the fairness and wisdom of the provision of the act which submits to the board the question of reasonable excuse for its determination.

The finding is not an arbitrary statement, but is sustained by sufficient evidence.

As sustaining the decision of the Industrial Board, see the following cases: *Johansen v. Union Stock Yards Co.* (1916), 99 Neb. 328, 156 N. W. 511, L. R. A. 1916A 83, 89, 244; *Donahue v. Sherman's Sons Co.* (1916), 39 R. I. 373, 98 Atl. 109, L. R. A. 1917A 76; *Tibbs v. Watts et al. Co.* (1909), 2 B. W. C. C. 164; *Fry v. Cheltenham Corp.* (1912), 81 L. J. K. B. N. S. 41; *Hoare v. Arding and Hobbs* (1911), 5 B. W. C. C. 36; *Schmidt v. O. K. Baking Co.* (1916), 90 Conn. 217, 96 Atl. 963; *Knoll v. City of Salina* (1916), 98 Kan. 428, 157 Pac. 1167; *Carroll's Case* (1916), 225 Mass. 203, 114 N. E. 285.

Furthermore, as already stated, appellant's pit boss, or general foreman, had actual knowledge of the injury suffered by appellee at the time

4. disability therefrom was definitely ascertained to have resulted from such injury, and this has been held sufficient under our statute. *In re McCaskey* (1917), 65 Ind. App. 349, 117 N. E. 268; *Hornbrook-Price Co. v. Stewart* (1918), 66 Ind. App. 400, 118 N. E. 315.

The award is affirmed, with five per cent. penalty added thereto, as provided by the act of 1917, Acts 1917 p. 154, §8020q2 *et seq.* Burns' Supp. 1918.

NOTE.—Reported in 120 N. E. 386. Workmen's compensation: notice of injury and claim, L. R. A. 1916A 83, 244, 1917D 135, 1918E 556.

BECKMAN SUPPLY COMPANY v. NEWELL ET AL.

[No. 9,514. Filed March 12, 1918. Rehearing denied June 28, 1918.
Transfer denied December 13, 1918.]

1. **EXECUTION.—*Proceedings Supplemental.—Pleadings.***—Under §865 Burns 1914, §822 R. S. 1881, in a proceeding supplemental to execution, formal pleadings are unnecessary, other than the affidavit or verified complaint on which the order to appear is issued and the demurrer and motions authorized by the statute to test the sufficiency of the order and affidavit. p. 684.
2. **EXECUTION.—*Proceedings Supplemental.—Procedure.***—The rules of civil procedure apply in proceedings supplemental to execution where the statute has not expressly, or by fair implication, indicated the procedure contemplated. p. 685.
3. **EXECUTION.—*Proceedings Supplemental.—Findings and Conclusions.—Right to Require.***—Neither party to a proceeding supplemental to execution has the right to require the trial court to make a special finding of facts and state its conclusions of law thereon under the provisions of the Civil Code; and where a special finding of facts is made in such a proceeding it will be treated as a general finding only. p. 685.
4. **EXECUTION.—*Proceedings Supplemental.—Unauthorized Pleadings.***—In a proceeding supplemental to execution, where pleadings other than those authorized by the statute are filed, they may be disregarded. p. 686.
5. **ASSIGNMENTS.—*Executory Contract.—Assignment.—Validity.—Statute.***—Under §9071 Burns 1914, §5501 R. S. 1881, providing that all written promises shall be negotiable by indorsement, a valid, subsisting executory agreement in writing for the improvement of a sidewalk may be assigned by the contractors for the work, even though no payment was due them at the time the assignment was made. p. 687.
6. **EXECUTION.—*Executory Contract.—Lien on Proceeds.***—Under §728 Burns 1914, §686 R. S. 1881, giving a lien on the goods and chattels of an execution defendant within the jurisdiction of an officer from the time of the delivery of the execution to him, a judgment creditor, by virtue of its execution in the hands of the sheriff prior to the assignment by the judgment debtor of an executory contract for certain improvement work under which no payment was due, did not acquire a valid and enforceable lien for funds to become due the judgment debtor for work and materials to be thereafter furnished by him under the contract,

Beckman Supply Co. v. Newell—68 Ind. App. 679.

since there was no existing debt under the contract, which might never be performed so as to make effectual the obligation to pay. p. 688.

7. **EXECUTION.—Levy.—Executory Contract.—Statute.**—A debt evidenced by an executory contract for certain improvement work could be reached by the contractor's judgment creditor only under the provisions of §766 Burns 1914, §§774 R. S. 1881, providing that any debt or thing in action, legally or equitably assignable, may be levied upon, when given up by the defendant, and sold on execution, in the same manner as other personal property. p. 690.

From Lake Superior Court; *Virgil S. Reiter*, Judge.

Action by the Beckman Supply Company against James Newell and others. From the judgment rendered, plaintiff appeals. *Affirmed*.

William J. Whinery, for appellant.

Frank B. Pattee, for appellees.

FELT, J.—This is a proceeding supplemental to execution brought by appellant against James and John Newell, partners doing business under the name and style of Newell Brothers, Henry P. Downey and A. Portz, partners doing business under the name of Downey and Portz Company, the Grasselli Chemical Company, a corporation, and a number of other defendants.

The verified amended complaint alleges in substance that on October 19, 1914, appellant recovered a judgment in the Lake Superior Court against Newell Brothers, aforesaid, for \$654.59; that on February 20, 1915, it caused an execution to be issued thereon, and the same was delivered to the sheriff of Lake county, Indiana, in which county said Newell and Newell resided; that the same was wholly unsatisfied when the complaint was filed; that on July 22, 1915, appellant caused an alias execution to be issued on

said judgment, and thereupon said first execution was duly returned unsatisfied; that said judgment is unpaid, and the sheriff still holds said alias execution, and the same is unsatisfied; that Downey and Portz are residents of Lake county, Indiana, and are indebted to Newell Brothers in the sum of \$500; that the Grasselli Chemical Company is a resident of Lake county, Indiana, and is indebted to said Newell Brothers in the sum of \$1,500; that said Newell Brothers, as partners, are not entitled to claim any property as exempt from execution; that the defendants Henry P. Downey, A. Portz, partners, James Cunningham, Arthur Hatfield, Frank Hatfield, William Buehring, Joe Minch, Harry Blodgett, Jacob Wiker, Axel Anderson, Kussman Krevice, Lawrence Stoecker and George Manke, each claim some interest in and to the said sum of money due from the defendant Grasselli Chemical Company to said Newell Brothers, the exact nature of which claims is unknown to plaintiff; that said claims are unfounded and are junior to the rights of plaintiff; that said parties are made defendants hereto to answer as to their rights, if any, in the premises.

Downey and Portz filed a cross-complaint, which they dismissed before the court announced its finding. The Grasselli Chemical Company filed an interpleader asking to be permitted to pay the sum due from it into court and be discharged from further liability. It thereafter filed an answer of general denial to the amended complaint.

Downey and Portz also filed a special answer in which they alleged in substance that Newell Brothers were financially embarrassed and had assigned to them the sum of money due from Grasselli Chemical

Company; that they were the owners thereof and entitled to payment of the same.

To this answer appellant filed a reply in two paragraphs, the first of which was a general denial. The second paragraph alleges in substance that in June, 1915, Newell Brothers entered into a written contract with the Grasselli Chemical Company to construct a sidewalk along and upon its real estate, for the sum of \$1,018.70, and entered upon the work; "that on the 17th day of July, 1915, with the intent to cheat, hinder, delay and defraud their creditors, including this plaintiff, the said defendants Newell and Newell purported to assign the proceeds of said contract to defendants Downey and Portz; that said Downey and Portz received and accepted said assignment with full knowledge and notice that said purported assignment was so made with intention to hinder, delay and defraud the creditors of said defendants Newell and Newell, including the plaintiff; that at the time of making said purported assignment, said Newell and Newell were insolvent and were without sufficient other property, goods and chattels, to pay their then existing debts, including the claim of plaintiff, all of which said defendants Downey and Portz well knew; that by said assignment of the proceeds of said contract, said Newell and Newell divested themselves of all power and property with which plaintiff's claim herein might be paid; that at the time of said purported assignment, said defendants Newell and Newell did not then have, nor have they since had, nor have they now sufficient other property, subject to execution, with and out of which to pay their then present and existing debts, including the claim of plaintiff herein;

that at the time of making said purported assignment said defendants Newell and Newell, copartners, had no other property whatsoever, subject to execution, all of which was well known to said Downey and Portz, and to said Newell and Newell."

Newell and Newell also filed a special answer in which they alleged in substance that the property belonging to them as partners is covered by chattel mortgage in the sum of \$3,800; that they are indebted to Downey and Portz in the sum of \$5,000; that they claim no right to the money held by Grasselli Chemical Company, and prior to the commencement of this proceeding they assigned said sum for a valuable consideration to said Downey and Portz.

Appellant replied to such answer by general denial. The other defendants filed a general denial to the complaint. The other defendants to the amended complaint also filed cross-complaints, which were dismissed before the trial of the case. The plaintiff also dismissed its complaint as to Lake County Savings and Trust Company.

The plaintiff requested the court to find the facts specially and state its conclusions of law thereon, which request was granted. The cause was tried on October 27, 1915, on the issues formed on the amended complaint and the cross-complaint of Downey and Portz. The case was taken under advisement by the court. On November 1, 1915, Downey and Portz dismissed their cross-complaint, and moved the court to strike out plaintiff's request for a special finding of facts. The court thereafter sustained said motion, to which ruling appellant excepted. The court made a general finding, that plaintiff take nothing by its complaint and that the funds in the hands of Grasselli

Chemical Company be paid to Downey and Portz. Appellant's motion for a new trial was overruled, and judgment rendered in accordance with the afore-said finding.

Appellant has assigned as error: (1) The overruling of its motion to require Downey and Portz to make their special answer more specific; (2) overruling appellant's demurrer to the special answer of Downey and Portz; (3) sustaining the motion to strike out its request for a special finding of facts and conclusions of law, and in refusing to make a special finding of facts and state conclusions of law thereon; (4) overruling appellant's motion for a new trial; (5) sustaining the motion of Downey and Portz to modify the final judgment rendered on November 26, 1915, and in modifying said judgment. This suit was brought in pursuance of the provisions of §859 *et seq.* Burns 1914, §816 R. S. 1881.

Section 822 R. S. 1881, being §865 Burns 1914, is as follows: "Costs shall be awarded and taxed in

this proceeding as in other cases; and all proceedings under this act, after the order has been made requiring parties to appear and answer, shall be summary, without further pleadings, upon the oral examination and testimony of parties and witnesses. But the sufficiency of the order and of the affidavit first filed by the plaintiff may be tested by demurrer or motion to dismiss or strike out the same."

This section expressly dispenses with formal pleadings other than the affidavit or verified complaint on which the order was issued, and the demurrer and motions authorized by its provisions for the purposes therein stated. *Wallace v. Lawyer* (1883), 91 Ind.

128, 130; *Burkett v. Holman* (1885), 104 Ind. 6, 11, 3 N. E. 406; *Pouder v. Tate* (1887), 111 Ind. 148, 150, 12 N. E. 291; *Burkett v. Bowen* (1889), 118 Ind. 379, 381, 21 N. E. 38.

In *Burkett v. Holman*, *supra*, our Supreme Court said: "All of this section 822, except so much thereof as relates to the award and taxation of costs, is new legislation, that is, it is not to be found in the old code of 1852, but appears for the first time in the civil code of 1881. So much of the section as relates to costs is a literal re-enactment of section 525 in the civil code of 1852. 2 R. S. 1876, p. 232. The new legislation in such section is what may be called a legislative overruling, by implication, of the decisions of this court, in *Toledo, etc., R. W. Co. v. Howes*, *supra* (68 Ind. 458) and the cases which follow it. That is, contrary to the decisions of this court in the cases cited, that pleadings might be filed and issues of law or fact formed, in such suits as the one at bar, section 822 provides, in effect, that there shall be no pleadings filed in such cases, except that the sufficiency of the plaintiff's affidavit or verified complaint 'may be tested by demurrer, or motion to dismiss or strike out the same.' "

The rules of civil procedure apply in proceedings supplemental to execution, where the statute has not expressly, or by fair implication, indicated the procedure contemplated.

Based on the summary character of the proceeding authorized by the statute, *supra*, it has been held that neither party to such proceedings has the right

3. to require the trial court to make a special finding of facts and state its conclusions of law thereon, under the provisions of our Civil Code.

Hutchinson v. Trauerman (1887), 112 Ind. 21, 25, 13 N. E. 412; *Chicago, etc., R. Co. v. Summers* (1887), 113 Ind. 10, 15, 14 N. E. 733, 3 Am. St. 616; *Balz v. Benninghof* (1892), 5 Ind. App. 522, 524, 32 N. E. 595; *Harper v. Behagg* (1895), 14 Ind. App. 427, 429, 430, 42 N. E. 1115; *Berry v. Berry* (1896), 147 Ind. 176, 178, 46 N. E. 470. Where a special finding of facts has been made in such a proceeding it will be treated as a general finding only. *Balz v. Benninghof, supra*.

Where pleadings other than those authorized by the statute are filed they may be disregarded. *Wallace v. Lawyer, supra*; *Balz v. Benninghof,*

4. *supra*. From the foregoing propositions it follows that the court did not err as alleged in appellant's first, second and third assignments.

The propositions above announced necessarily dispose of all the grounds of appellant's motion for a new trial adversely to its contention, unless it be the fifth and sixth, viz., that the decision of court is not sustained by sufficient evidence; that it is contrary to law.

Appellant contends that the undisputed evidence shows that by virtue of the execution on its judgment in the hands of the sheriff, it acquired and held a valid lien on the proceeds of the contract between Newell Brothers and Grasselli Chemical Company, which was superior to the right of Downey and Portz acquired by the assignment to them of the improvement contract; that such assignment was void because it was only an agreement to assign a mere possibility, which did not have even a potential existence; that the assignment by Newell Brothers to

Downey and Portz was fraudulent as against appellant.

The evidence shows without controversy that the first execution issued on appellant's judgment was returned unsatisfied on July 22, 1915, and that an *alias* execution was issued thereon on the same day and placed in the hands of the sheriff. Also that this suit was filed and process issued thereon and served on the same day.

The evidence also shows that the Grasselli Chemical Company let to Newell Brothers a contract for constructing a sidewalk, on June 28, 1915, for the sum of \$1,018.70; that the amount to be paid Newell Brothers under said contract was by them duly assigned to Downey and Portz, for value received, on July 17, 1915; that no material had been used on said improvement at the time of such assignment, but the work of grading had been commenced prior thereto; that thereafter Newell Brothers completed said work according to contract, and the material therefor and the money for payment of labor was furnished by Downey and Portz.

The Grasselli Chemical Company admitted that it owed the full amount of the contract and was ready and willing to pay the same in accordance with the order of the court. The insolvency of Newell Brothers was proved and uncontroverted.

The contract for the improvement of the sidewalk was more than a mere possibility of something to be secured in the future. It was a valid, subsisting, executory agreement between the parties.

5. True, no payment was due under it at the time of the assignment, but that in no way affected the validity of the assignment. §9071 Burns 1914,

Acts 1897 p. 233; *Magic Packing Co. v. Stone-Ordean, etc., Co.* (1902), 158 Ind. 538, 540, 64 N. E. 11; *Kreig v. Palmer Nat. Bank* (1912), 51 Ind. App. 34, 40, 95 N. E. 613.

But appellant further contends that, if the assignment was valid, Downey and Portz took it subject to the lien of the execution issued upon its judgment against Newell Brothers.

Appellant does not claim that any payment was due under the contract at the time the assignment was made, but asserts that by virtue of the execution in its favor, in the hands of the sheriff of the county, it acquired a lien on the funds in the hands of the Grasselli Chemical Company prior to the date of the assignment to Downey and Portz, by virtue of §728 Burns 1914, §686 R. S. 1881. This section gives a lien on the "goods and chattels" of an execution defendant within the jurisdiction of the officer from the time of the delivery of the execution to such officer. Section 766 Burns 1914, §724 R. S. 1881, provides that: "Any debt or thing in action, legally or equitably assignable, may be levied upon, when given up by the defendant, and sold on execution, in the same manner as other personal property."

In any view that may be taken of the nature of the instrument or contract in question, appellant, by virtue of its execution in the hands of the sheriff, prior to the assignment to Downey and Portz, did not acquire a valid and enforceable lien against the funds to come due from Grasselli Chemical Company for work to be performed and material to be furnished thereafter under such contract. Nothing was due at the time the assignment was made, and there-

fore there was nothing to which the lien of the execution could attach, even if it should be conceded—which is not the case—that the lien of the execution would attach to funds in the hands of Grasselli Chemical Company due under the construction contract by virtue of §728, *supra*.

The contract was executory, and the amount to become due thereunder was potential rather than actual. There was no existing debt against the Grasselli Chemical Company at that time, for its obligation to pay depended upon the performance of the conditions of the contract, which had not then been executed, and which might never be performed so as to make effectual the obligation of the chemical company to pay. 17 Cyc 940, 968, 971; *Paine v. Gunniss* (1895), 60 Minn. 257, 62 N. W. 280; *Hasbrouck v. Bouton* (1871), 60 Barb. (N. Y.) 413; *Keck v. State, ex rel.* (1894), 12 Ind. App. 119, 125, 39 N. E. 899; *Bay v. Saulspaugh* (1881), 74 Ind. 397, 399; *Marion Tp. Union Drainage Co. v. Norris* (1871), 37 Ind. 424, 431, 432; *Steele v. McCarty* (1892), 130 Ind. 547, 548, 30 N. E. 516.

In *Paine v. Gunniss, supra*, the essential facts were similar to those of the case at bar, and the Supreme Court of Minnesota said: "Was this attempted levy, made by the sheriff, a valid and effectual one? We are of the opinion that it was not. At the time when this attempted levy was made, there was nothing due or payable to the contractors or the receiver upon the contract, and whether there ever would be was contingent upon its further performance, * * * neither the inchoate contingent claim on the contract nor the claim for unliquidated damages was subject to levy, * * * whether they would earn any more

money upon the contract would depend upon their power and ability to do so. It was therefore a contingency depending upon the will and ability of the contractors to go on with the work."

By virtue of the execution in the hands of the sheriff as aforesaid, appellant acquired no lien upon or right to the proceeds to be derived from the

7. carrying out of the improvement contract. The debt evidenced thereby could only be reached by means of the provisions of §766, *supra*. Such obligations or debts are leviable only upon the condition that the execution defendant give them up. There is no claim that this condition of the statute was complied with in the case at bar. *Vansickle v. Shenk* (1898), 150 Ind. 413, 416, 50 N. E. 381; *Steele v. McCarty, supra*; *Marion Tp. Union Drainage Co. v. Norris, supra*.

The assignment was not fraudulent as against appellant. The decision of the court is supported by sufficient evidence.

Appellant, having failed to make out its case under the law, could not in any view of the case have been harmed by the action of the court in modifying the judgment so as to make the money due from the Grasselli Chemical Company payable to Downey and Portz instead of to the clerk of the court.

We find no reversible error. Judgment affirmed.

NOTE.—Reported in 118 N. E. 962.

SMITH ET AL. v. LINTON TRUST COMPANY ET AL.

[No. 9,577. Filed December 13, 1918.]

1. **EXECUTORS AND ADMINISTRATORS.—Petition to Sell Land.—Cross-Complaint to Quiet Title.—Dismissal of Petition.—Effect.**—Where an administrator filed its petition to sell real estate to pay decedent's debts, and defendants brought a cross-action to quiet title to the land involved, the dismissal of plaintiff's petition was in effect an adjudication that plaintiff had no claim against the estate. p. 693.
2. **APPEAL.—Review.—Harmless Error.**—In an administrator's action to sell real estate to pay debts, where defendants brought a cross action to quiet title to the land involved, the dismissal of plaintiff's petition was in effect an adjudication that plaintiff had no claim against the real estate, and cross-complainants were not harmed by failure of the trial court to render judgment quieting title as against plaintiff. p. 694.

From Greene Circuit Court; *Claude E. Gregg*, Special Judge.

Petition by the Linton Trust Company, administrator of the estate of Thomas B. Smith and others, against Wilbert Smith and others, to sell real estate to pay debts of deceased. Defendants filed cross-complaints to quiet title to the real estate involved. From the judgment rendered, the defendants appeal. *Affirmed.*

Slinkard, Vosloh & Hendren, for appellants.

J. B. Filbert, for appellees.

IBACH, J.—On August 15, 1913, the Linton Trust Company, as administrator of the estate of Thomas B. Smith, filed its petition in the trial court to sell real estate owned by said deceased at the time of his death to pay debts. The appellants filed separate cross-complaints against the "Linton Trust Com-

pany," plaintiff, and their respective codefendants, to quiet title to separate parcels of said real estate. Upon issues formed upon said petition and cross-complaints by general denials the cause was tried by the court without the intervention of a jury, and a general finding and judgment rendered dismissing plaintiff's petition and adjudging the costs thereof against the plaintiff. It was further adjudged and decreed that appellants' respective titles should be quieted as against each other, and that they (appellants) take nothing on their respective cross-complaints as against the appellees.

The appellants filed separate motions for a new trial, which were overruled, and such rulings are assigned as error. The grounds of such motions, viz., that the decision of the court is not sustained by sufficient evidence and is contrary to law, present the controlling questions in this appeal, and such questions are identical for the purpose of discussion.

It appears from the evidence that Thomas B. Smith died, the exact date not being shown, the owner of a certain tract of land situate in Greene county, Indiana, containing fifty-eight acres, and left surviving him his widow, four adult children (appellants) and a minor child, named Martha. On November 12, 1912, the widow and adult children filed a complaint in the Greene Circuit Court, naming as sole defendant Martha Smith; minor, for partition of said land. It is alleged in said complaint, among other things, that plaintiffs have agreed to a division of said land, setting out the particular division agreed upon; that no debts exist unpaid against the estate, and no administrator is necessary; that the widow and each of said children take the respective portions of the tract

set off to them in lieu of their whole interest in said estate. A guardian *ad litem* was appointed to represent the interest of said minor child, and he filed a general denial for her. The cause was tried by the court, and a finding made that the allegations of the complaint were true, and that the parties had entered into an agreed partition which was fair and just and should be confirmed; that the value of the share of Martha Smith was the same in value as the other children, and that a commissioner should be appointed to make deeds conveying such land in accordance with the division agreed upon. Judgment was rendered on such finding on December 9, 1912, and, in accordance therewith, a commissioner was appointed, the lands conveyed, and the deeds approved by the court.

It is stipulated and agreed in this case that the judgment and partition made on December 9, 1912, as above set out, has never been attacked or set aside.

It is not claimed by appellants that the dismissal or nonsuit of plaintiff was in any sense erroneous. Indeed, their contention is that the evidence conclusively shows the debts had all been paid and satisfied, including the widow's statutory allowance, and that the administrator had no interest whatever in the lands.

The dismissal of plaintiff's petition by the court was in effect an adjudication that plaintiff had no claim against said real estate. This procedure

1. seems to have precedent in other jurisdictions.

5 R. C. L. 681; *Peterson v. Gibbs* (1905), 147 Cal. 1, 81 Pac. 121, 109 Am. St. 107. Complaint of such action must come from plaintiff, if at all, and no cross-errors are assigned.

The evidence, we think, also shows conclusively as between the parties to this action that the matter of division had been agreed upon and adjudi-

2. cated, and that the administrator has no interest in the lands, and neither the widow nor any of the children have any interest in said lands, excepting that conveyed directly to them by the commissioner's deeds. The partition proceeding, binding upon all the heirs and the widow, is a matter of record. Under such evidence we conclude that, although the court might have proceeded to render judgment quieting title as against the appellees, such judgment would be no more effective, or binding, than the judgment which was rendered.

In any event, no substantial right of appellants has been violated by the ruling of the trial court, and hence no reversible error is shown.

Judgment affirmed.

NOTE.—Reported in 121 N. E. 92.

MOORE AND RICHTER LUMBER COMPANY v. SCHEID.

ET AL.

. [No. 9,667. Filed December 13, 1918.]

1. STATES.—*School Fund Mortgage.—Party in Interest.*—The state is the real party in interest under a school fund mortgage. p. 697.
2. APPEAL.—*Failure of Appellee to File Briefs.—Statement of Facts.*—Where no briefs are filed on behalf of appellee, the court on appeal is justified in relying on appellant's statement of what facts the decision of the trial court's denial of the right to a mechanic's lien rested on. p. 697.
3. MECHANICS' LIENS.—*Right to Materialman's Lien.—Use of Materials.*—The mechanic's lien statute rests on the principle that

Moore, etc., Lumber Co. v. Scheid—68 Ind. App. 694.

one who furnishes labor or material for the improvement of property is entitled to look to that property for his compensation, and a materialman claiming a lien must ordinarily show that his materials were furnished for and were actually used in the erection, alteration or repair of the building against which the lien is asserted. p. 697.

4. **MECHANICS' LIENS.**—*Right to Materialman's Lien.—Use of Materials.*—It is not always necessary for one asserting the right to a materialman's lien to show that the material furnished actually went into the building for which it was furnished, since the circumstances in a particular case, especially where the material was furnished to the owner of a building to be used therein, may estop such owner, in a foreclosure suit, from invoking the general rule. p. 698.

5. **MECHANICS' LIENS.**—*Materialman's Lien.—Material Furnished But Not Used.—Estoppel.*—Where the trial court found specially that plaintiff furnished materials directly to an owner of realty on his promise to use it in the construction of his dwelling house and on the security of that building and the realty on which it was being erected, and that the owner diverted the material to other use without the knowledge or consent of plaintiff, the owner was estopped from relying on the general rule that a materialman claiming a lien must ordinarily show that his materials were actually used in the building against which the lien is asserted. p. 698.

6. **APPEAL.**—*Review.—Disposition of Case.—New Trial.*—Where appellant asks that the trial court be directed to restate its conclusions of law on the facts found and render judgment accordingly, but the record discloses that the rights of other parties might thus be improperly affected, the ends of justice are better served by ordering a new trial as authorized by §702 Burns 1914, §660 R. S. 1881. p. 699.

From Porter Circuit Court; *H. H. Loring*, Judge.

Action by Moore and Richter Lumber Company against Adolph Scheid and others. From a judgment for defendants, the plaintiff appeals. *Reversed.*

Darrow & Rowley and *F. M. Trissal*, for appellant.

HOTTEL, J.—Appellant instituted this action to foreclose a mechanic's lien on certain real estate in LaPorte county owned by appellee Adolph Scheid.

The trial court made a special finding of the facts in issue, and stated its conclusions of law thereon to the effect that appellant is entitled to recover from Scheid the sum of \$406.13 for materials furnished, but is not entitled to a foreclosure of its alleged lien. So far as material to the present inquiry the findings of fact show that on November 26, 1913, appellant and appellee Scheid entered into a verbal contract, wherein appellant agreed to furnish lumber and building material for the completion of a dwelling house on real estate owned by Scheid; that thereafter, on various dates beginning with January 20, 1914, and ending with November 16, 1914, appellant did furnish to said Scheid lumber and other material for use in the construction of said dwelling house, and all of such lumber and material was in fact used by Scheid in the construction of said building, except the material furnished on August 11, October 6, and November 16, 1914, which are the last three dates on which any material was furnished; that the material furnished on these dates was used by Scheid in the construction of other buildings and on real estate other than that described in appellant's complaint, all without appellant's knowledge or consent; that appellant, in furnishing and delivering material under dates of August 11, October 6, and November 16, 1914, understood and believed that the same was to be used by Scheid in the construction of his dwelling house, in accordance with the contract of the parties, and delivered the same with that understanding; that on December 3, 1914, appellant filed a proper notice of an intention to hold a mechanic's lien on the real estate in question, and instituted this action within one year thereafter; that on July 2, 1914, Adolph Scheid and Rose

Scheid, his wife, executed to the State of Indiana and delivered to the auditor of LaPorte county a mortgage on said real estate for the use of the common school fund in the sum of \$1,200, which is unpaid; that said mortgage was duly recorded in the School Fund Mortgage Record on July 3, 1914, and the \$1,200 received from the school fund was applied on the payment of labor and materials used in the construction of Scheid's said dwelling house.

In bringing this action, appellant has named as parties defendant, in addition to the owners of the real estate, the auditor and board of commis-

1. sioners of LaPorte county, the county itself, and the trustees of the common school fund.

The decision of the trial court does not directly involve the issue of priority as between appellant's alleged lien and the school fund mortgage, but in view of the conclusion which we have reached, that issue will doubtless arise on a retrial of the case, we deem it proper, at this time, to call attention to the fact that the state is the real party in interest under a school fund mortgage. *Snodgrass v. Morris* (1890), 123 Ind. 425, 426, 24 N. E. 151; *Crooks v. Kennett* (1887), 111 Ind. 347, 350, 12 N. E. 715. In this connection, see *Hogston v. Bell* (1916), 185 Ind. 536, 548, 112 N. E. 883.

In the present appeal no briefs have been filed on behalf of appellees, and we are justified, therefore, in relying on appellant's statement that the de-

2. cision of the trial court, in so far as it denies the right to a lien, rests on the fact that the material furnished to Scheid within the sixty
3. days prior to December 3, 1914, did not actually go into the construction of the building for

which it was furnished. The mechanic's lien statute rests on the principle that one who furnishes labor or material for the improvement of property is entitled to look to that property for his compensation, and "a materialman claiming a lien must *ordinarily* show that his materials were furnished for and were actually used in the erection, alteration or repair of the building against which the lien is asserted." (Our italics.) *Potter Mfg. Co. v. A. B. Meyer & Co.* (1909), 171 Ind. 513, 519, 86 N. E. 837, 131 Am. St. 267, and cases cited. However, it is not *always* necessary to show that the material furnished actually went

4. into the building, since the circumstances in a particular instance, especially where, as in the present case, the material was furnished to the owner of the building to be used herein, may be such as to estop such owner in a foreclosure suit from invoking the general rule. *Totten & Hogg Iron, etc., Co. v. Muncie Nail Co.* (1897), 148 Ind. 372, 47 N. E. 703; *Smith v. Newbaur* (1896), 144 Ind. 95, 105; 42 N. E. 40, 1094, 33 L. R. A. 685; *Scott v. Goldinghorst* (1890), 123 Ind. 268, 270, 24 N. E. 333; *Hill v. Braden* (1876), 54 Ind. 72, 76; *City of Crawfordsville v. Barr* (1873), 45 Ind. 258, 261; *Welch v. Sherer* (1879), 93 Ill. 64, 67.

In this case the trial court has found specially that appellant furnished the material in question directly to the owner of the real estate on his promise

5. to use the same in the construction of his dwelling house, and on the security of that building and the real estate on which it was being erected. It further finds that Scheid diverted this material to other use without the knowledge or consent of appellant. These circumstances are sufficient to estop him from relying on the rule which has evidently

Prudential Ins. Co. v. Diffenbaugh, Admr.—68 Ind. App. 699.

guided the trial court in its decision and that decision must be reversed. Appellant asks that the

6. circuit court be directed to restate its conclusions of law on the facts found and to render judgment accordingly, but, as the record discloses that the rights of other parties might thus be improperly affected, we believe that the ends of justice will be better served through the granting of a new trial. §702 Burns 1914, §660 R. S. 1881; *Kitchell v. Schneider* (1913), 180 Ind. 589, 594, 103 N. E. 647; *McCoy v. Kokomo R., etc., Co.* (1902), 158 Ind. 662, 667, 64 N. E. 92.

Judgment reversed, with instructions to grant a new trial, and for further proceedings not inconsistent herewith.

NOTE.—Reported in 121 N. E. 91. Mechanics' liens: material furnished for structure, but not actually used therein, as basis of lien, showing necessary, 31 L. R. A. (N. S.) 746, L. R. A. 1918D 1041, 27 Cyc 46.

PRUDENTIAL INSURANCE COMPANY OF AMERICA v.
DIFFENBAUGH, ADMINISTRATOR, ET AL.

[No. 9,545. Filed December 17, 1918.]

1. PLEADING.—*Complaint.*—*Sufficiency as to Coplaintiffs.*—A complaint which does not state a good cause of action as to all, though it does as to some, of the plaintiffs is bad as to all for want of sufficient facts to constitute a cause of action. p. 702.
2. PLEADING.—*Demurrer to Complaint.*—*Scope of Review.*—In an action on a life insurance policy by insured's son in his individual capacity and as administrator, where the first paragraph of complaint alleged that the son in his personal capacity was the sole beneficiary, and the second averred that both plaintiffs were cobeneficiaries, and entitled to maintain a joint action, a

Prudential Ins. Co. v. Diffenbaugh, Admr.—68 Ind. App. 699.

demurrer to the second paragraph required a consideration of it alone, and, such paragraph being sufficient, the allegation of the first paragraph did not, as to the demurrer, render the complaint insufficient as not stating a cause of action as to all plaintiffs. p. 703.

3. **PLEADING.—Complaint.—Stating Alternative Cause of Action.**—In an action on a life policy by insured's son in his individual capacity and as executor, an allegation in a paragraph of complaint that the son "and the executor and administrator of said estate were named as beneficiaries" is not subject to the objection that it attempts to state an alternative cause of action. p. 703.
4. **INSURANCE.—Life Insurance.—Action on Policy.—Failure to Make Policy Part of Complaint.—Statute.**—In an action on a policy of life insurance, an averment in the complaint that after insured's death the insurer procured possession of the policy and refused to deliver it to plaintiff and for that reason it was not set out in the complaint, shows sufficient excuse for failure to comply with §368 Burns 1914, §362 R. S. 1881, requiring that when any pleading is founded on a written instrument or account, the original, or a copy thereof, must be filed with the pleading. p. 704.
5. **APPEAL.—Presenting Questions for Review.—Transcript of Proceedings.**—Where appellant fails to present a definite and accurate transcript of the proceedings below showing which of conflicting record entries correctly represented the action of the trial court on a demurrer to a paragraph of reply, no question is presented for review as to the ruling on the demurrer. p. 704.
6. **APPEAL.—Presenting Questions for Review.—Objection to Evidence.**—An objection to the admission of evidence that it is irrelevant, incompetent and immaterial, and does not tend to support any of the issues in the case presents no question for review on appeal. p. 706.
7. **INSURANCE.—Life Insurance.—Action on Policy.—Evidence.—Copy of Policy.**—In an action on a life policy, where the copy of the policy offered in evidence by plaintiff was admitted by defendant insurer in its affirmative answer to be a true copy of the policy sued on, the admission of the copy in evidence was proper and pertinent as tending to prove the cause of action. p. 706.
8. **APPEAL.—Review.—Harmless Error.—Admission of Evidence.**—In an action on a life policy, where defendant insurer contended that the designated beneficiaries were the executor or administrator of insured's estate and the jury found in accordance with such contention, the admission in evidence for plaintiff, insured's son and executor, who claimed that he was personally the beneficiary, of a copy of the policy in which a beneficiary was not named, was harmless. p. 707.

Prudential Ins. Co. v. Diffenbaugh, Admr.—68 Ind. App. 699.

9. EVIDENCE.—*Opinion.*—*Health of Insured.*—*Nonexpert Witness.*—In an action on a life insurance policy, it was proper to permit nonexpert witnesses to give their impressions as to the state of health of insured at the time the policy in suit was issued. p. 707.
10. APPEAL.—*Review.*—*Conflicting Evidence.*—The court on appeal will not weigh conflicting evidence. p. 708.
11. INSURANCE.—*Life Insurance.*—*Misrepresentation in Application.*—*Effect.*—A false answer in a written application for life insurance made in response to an inquiry concerning other insurance on the life of applicant is a material misrepresentation which will ordinarily avoid the policy. p. 708.
12. INSURANCE.—*Life Insurance.*—*Agent's Misrepresentations to Company.*—*Estoppel.*—Where an applicant for life insurance informed the insurer's agent that she had other insurance, but he misrepresented to the insurer by the answers he wrote into the application that applicant had no other insurance, the insurer is estopped after insured's death from contesting the validity of the policy on the ground that she had falsely represented that she had no other insurance. p. 708.
13. APPEAL.—*Briefs.*—*Waiver of Error.*—Specifications in a motion for a new trial are waived by appellant's failure to refer thereto in the statement of points and authorities in its brief. p. 709.

From Huntington Circuit Court; *Samuel E. Cook*, Judge.

Action by Louis A. Diffenbaugh, administrator of the estate of Sarah M. Diffenbaugh, deceased, and others, against the Prudential Insurance Company of America. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Lesh & Lesh and Breen & Morris, for appellant.

Bowers & Feightner, for appellees.

HOTTEL, J.—This action was instituted by appellee Louis A. Diffenbaugh, in his individual capacity, to recover on a policy of life insurance issued by appellant on the life of Sarah M. Diffenbaugh, mother of the plaintiff. The original complaint was in one paragraph and contained the usual allegations in cases of

this character, showing the execution of the policy contract, the death of the insured, the compliance with all provisions of the policy by the insured during her lifetime and by plaintiff after her death, and the refusal on the part of appellant to pay the claim. The insurance policy, however, is not copied into or otherwise made a part of the pleading, and explanation is made therefor in the averment: "That after the death of the said Sarah M. Diffenbaugh the said defendant procured possession of said policy of life insurance and refuses to redeliver the same to this plaintiff and for that reason the plaintiff herein cannot set out a copy of said policy of life insurance as a part of this complaint, nor allege the payments thereof with minute particularity." It is also alleged generally "that this plaintiff is the one and only beneficiary named in the said policy of insurance."

Subsequently, on motion of the original plaintiff, Louis A. Diffenbaugh, administrator of the estate of Sarah M. Diffenbaugh, was made a coplaintiff, over the objection of appellant, and a second paragraph of complaint was filed, in which the appointment and qualification of Louis A. Diffenbaugh as administrator of his mother's estate is shown and the allegation made "that the said Louis A. Diffenbaugh and the executor and administrator of the said estate were named as beneficiaries in said policy of insurance." In other respects the second paragraph of complaint is substantially a repetition of the first paragraph.

A demurrer to the first paragraph of complaint was overruled before the second paragraph was filed, and

no question is presented with reference there-

1. to. Appellant demurred to the second paragraph of complaint on the grounds: (1) That

the pleading shows a defect of parties plaintiff; and (2) that it does not sufficiently allege a cause of action. The first objection is also presented under the second ground of demurrer, and apparently rests on the fact that the first and second paragraphs of complaint differ as to their designation of the beneficiary named in the insurance contract. There can be no doubt "that a complaint which does not state a good cause of action as to all, though it does as to some of the plaintiffs, is bad as to all, for want of sufficient facts to constitute a cause of action." *McIntosh v. Zaring* (1897), 150 Ind. 301, 313, 49 N. E. 164, 168, and decisions there collected. In the present case, however, the second paragraph of complaint expressly alleges that the two plaintiffs therein

2. named are cobeneficiaries under the insurance contract, and are thus entitled to maintain a joint action. This averment is clearly at variance with the allegation in the first paragraph that Louis A. Diffenbaugh in his personal capacity is the sole beneficiary, and this circumstance gives rise to a condition which is unusual as applied to various paragraphs of a complaint. For the purposes of a demurrer, however, only that paragraph of a pleading is to be considered which is made the direct object of attack, and, in this instance, appellees' second paragraph of complaint, standing alone, is clearly

3. sufficient as against the objection now under consideration. Counsel's further assertion that this paragraph attempts to state an alternative cause of action is not supported by the language of the pleading, which expressly alleges that the policy is payable to Louis A. Diffenbaugh *and* the executor or administrator of the insured's estate.

Prudential Ins. Co. v. Dittenbaugh, Admr.—68 Ind. App. 699.

The only remaining objection to the complaint which is discussed in appellant's brief is based on the statutory rule that: "When any pleading is

4. founded on a written instrument or on account, the original, or a copy thereof, must be filed with the pleading." §368 Burns 1914, §362 R. S. 1881. We are unable to agree with appellant's contention that the complaint fails to show a sufficient reason for the failure to comply with the above provision, since it has been expressly held that a copy of an instrument in possession of the adverse party need not be filed, especially where a demand for such instrument, or a true copy thereof, has been made and refused. *Keesling v. Watson* (1883), 91 Ind. 578, 580; *National Fire Ins. Co. v. Strebe* (1896), 16 Ind. App. 110, 44 N. E. 768; *Walter A. Wood, etc., Machine Co. v. Irons* (1894), 10 Ind. App. 454, 455, 36 N. E. 862, 37 N. E. 1046.

Appellant presented its defense in six paragraphs of answer and, to the sixth paragraph thereof, appellees filed four paragraphs of reply. Appellant

5. then challenged the sufficiency of the second, third and fourth paragraphs of reply by demurrer, and now asserts that the trial court erred in overruling that demurrer as to the third paragraph of the reply. The record recites that: "The Court, being fully advised in the premises, overrules said demurrer to the 2nd and 3rd paragraphs of the reply to the 6 paragraphs of answer, to which the defendant at the time excepts as to the ruling on each and the Court sustains the demurrer to the 3rd paragraph of said reply, to which said plaintiff at the time excepts." No ruling on the demurrer to the fourth paragraph of reply is shown, and it is impos-

sible to determine which of the conflicting entries as to the demurrer to the third paragraph correctly represents the action of the trial court thereon. Appellant's failure in this particular to present a definite and accurate transcript of the proceedings below leaves no question before this court as to the ruling in issue. *Rowan v. State* (1916), 184 Ind. 399, 403, 111 N. E. 431; *Weideroder v. Mace* (1916), 184 Ind. 242, 247, 111 N. E. 5.

In this connection, we might add that an examination of the record discloses an absence of any evidence which has a bearing on the issues presented by appellees' third paragraph of reply, and that fact tends to support the contention here made by appellees, and not disputed by appellant, that the trial court actually sustained the demurrer to the above pleading.

In support of its contention that the circuit court should have sustained its motion for a new trial, appellant first challenges certain rulings which relate to the admission of evidence. In its statement of the record, under the heading of "Erroneous Rulings on the Evidence," appellant sets out, as a part of the direct examination of Louis A. Diffenbaugh, the following question: "Was the policy Mr. Miller (appellant's agent) carried away with him after the death of your mother just the same as the paper marked Exhibit A, outside of the fact that that one was payable to you as beneficiary?" An objection to this question was overruled and the witness answered: "Yes, sir." The brief then recites that appellees offered in evidence a purported but modified copy of the policy in question, to which appellant objected for the reason that it was not identified and was only

claimed to be a similar document and not identical, which objection was overruled and the evidence admitted. In appellant's "Points and Authorities," under the heading of "Errors in the Admission of Evidence," is the following: "It is not competent to prove the contents of an instrument which forms the basis of an action by the introduction of another instrument which is admitted to be different from the instrument in suit and it was error to permit the plaintiffs to offer in evidence a policy which was not claimed to be the policy in suit and it was not claimed to be identical with the policy in suit."

We assume that this point is intended to be directed to the admission of the policy above referred to, but an examination of the record discloses that

6. the policy actually offered was "the paper marked Ex. A," and that the objection thereto was in the following form: "That the witness has not properly identified the paper marked 'Ex. A'; and for the further reason that *it is irrelevant, incompetent and immaterial, and does not tend to support any of the issues in the cause.*" That portion of the above objection which we have italicized presents no question for appellate review. *City of Michigan City v. Werner* (1917), 186 Ind. 149, 114 N. E. 636, 639; *Davis v. Cox* (1912), 178 Ind. 486, 493, 99 N. E. 803; *Metzger v. Franklin Bank* (1889), 119 Ind. 359, 361, 21 N. E. 973.

However, if appellant should be given the benefit of this objection in its entirety, the ruling would show no error. Exhibit A is, in fact, a copy of the

7. policy filed by appellant with its several paragraphs of affirmative answer in which it admits

the issuance of such a policy on the life of Sarah Diffenbaugh. It appears, therefore, that the copy of the policy actually offered in evidence was admitted by appellant to be the true copy, and its admission was proper and pertinent as tending to prove the cause of action in favor of the administrator. It follows that the only ruling of which appellant could complain relates to the admission of evidence which tended to dispute or contradict Exhibit A, and no such ruling is here presented. In any event,

8. the real controversy in this connection related to the beneficiary named in the policy, appellant claiming that the designated beneficiaries were the executor or administrator of the estate of the insured, while appellee Diffenbaugh asserted that he was the true beneficiary. On this issue the jury, both by its answers to interrogatories and its general verdict, found in accordance with appellant's contention, and the admission of said evidence was, at most, harmless error.

Three of appellees' witnesses were permitted to give their impressions as to the state of health of the insured at the time the policy in suit was is-

9. sued, and objection is made to this evidence on the ground that a nonexpert witness is incompetent to express an opinion as to the condition of health of another. This contention is not sustained by the authorities. *Louisville, etc., R. Co. v. Wood* (1888), 113 Ind. 544, 551, 14 N. E. 572, 16 N. E. 197; *Carthage Turnpike Co. v. Andrews* (1885), 102 Ind. 138, 142, 1 N. E. 364, 52 Am. Rep. 653.

Finally, it is urged that the evidence does not sustain the verdict of the jury, in that it shows: (1) That

the insured was not in sound health when the

10. policy was issued; and (2) that she then had other insurance in force on her life, contrary to her express representations in the applica-
11. tion for the contract in suit. The first ground of this contention may be disposed of through an invocation of the rule that an appellate tribunal will not weigh conflicting evidence. *Portland, etc., Mach. Co. v. Gibson* (1916), 184 Ind. 342, 346, 111 N. E. 184. Relative to the second ground, it may be conceded that a false answer in a written application for life insurance, made in response to an inquiry concerning other insurance on the life of an applicant, is a material misrepresentation and will ordinarily avoid the policy. *Germania Life Ins. Co. v. Lunkenheimer* (1891), 127 Ind. 536, 538, 26 N. E. 1082; *March v. Metropolitan Life Ins. Co.* (1898), 186 Pa. St. 629, 642, 40 Atl. 1100, 65 Am. St. 887.

Under the issues tendered by appellees' second paragraph of reply, however, proof was received, and largely without objection, which tended to

12. show that the insured made truthful disclosures concerning other insurance on her life, and that the alleged false statements relied on by appellant were, in reality, the statements of its agent who wrote the application, and not those of the insured. That fact, which we must now consider as established by the verdict of the jury. serves to estop appellant from contesting the validity of the policy on the ground stated. *Germania Life Ins. Co. v. Lunkenheimer, supra*, 542; *Federal Life Ins. Co. v. Whitehead* (1918), (Okl.) 174 Pac. 784, 792.

Charleston School Tp. v. Isgrigg—68 Ind. App. 709.

The remaining specifications in appellant's 13. motion for a new trial are waived by its failure to refer thereto in its statement of points and authorities.

No error appearing, the judgment of the circuit court is affirmed.

NOTE.—Reported in 121 N. E. 301.

CHARLESTON SCHOOL TOWNSHIP OF CLARK COUNTY
ET AL. v. ISGRIGG ET AL.

[No. 10,236. Filed November 21, 1918.]

From Bartholomew Circuit Court; *Marshall Harker*, Special Judge.

Action by William H. Isgrigg and others against the Charleston School Township of Clark county and others. From a judgment for plaintiffs the defendants appeal. *Appeal dismissed.*

Burdette C. Lutz, for appellants.

Hugh D. Wickens, John E. Osborn and Frank Hamilton, for appellees.

IRACH, J.—Appellees have filed a motion to dismiss this appeal upon grounds in substance as follows: That no exceptions were taken to the finding or judgment of the trial court; that the issue between the parties has become a moot question; that appellants complain of a part only of the judgment, and have not filed any motion to modify it; that the appellant's brief does not conform to the rules of this court, in that the points and authorities are not directed to any specific error or ruling; that the evidence is not in the record, because it was not filed within time. These objections are substantially borne out by the record and briefs, and under the authorities the appeal must be dismissed. *Fowler v. Newsom* (1909), 174 Ind. 104, 114, 90 N. E. 9; *Home Electric Light, etc., Co. v. Collins* (1903), 31 Ind. App. 493, 495, 66 N. E. 780; *Board, etc. v. Ryan* (1915), 183 Ind. 664, 110 N. E. 58; *Migatz v. Stieglitz* (1905), 166 Ind. 361, 77 N. E. 400. Appeal dismissed.

INDEX.

[NOTE.—The citation *Public Savings Ins. Co. etc. v. Greenwald*, 609, 623 (8), indicates that the opinion begins on page 609, that the point cited is on page 623, and that the point is numbered 8 in the margin.—REPORTER.]

ABANDONMENT—

Proof, intention, see EASEMENTS 1, 3.

Proof, under general issue, when permissible, see PLEADING 14.

ABORTION—

Cause of death, effect on life policy, see INSURANCE 7, 8.

ACCOUNT STATED—

1. *Comprehensiveness.—Presumption.*—While an account stated is *prima facie* to be taken as a settlement of all valid items of debit and credit existing between the parties at the time of its statement, this presumption is rebuttable.

Public Savings Ins. Co. v. Greenwald, 609, 623 (8).

2. *Conditional Claims.—Presumption.*—There is no presumption that a contingent or conditional liability or claim is included in an accounting, and this rule applies to a claim not due.

Public Savings Ins. Co. v. Greenwald, 609, 623 (9).

3. *Evidence.—Conditional Claims.*—In an action on an alleged account stated, evidence showing that certain items which were conditional and not due were not canvassed at the time of the settlement between the parties was insufficient to negative plaintiff's theory of an account stated.

Public Savings Ins. Co. v. Greenwald, 609, 623 (10).

4. *Requisites.—Partial Settlement.*—It is not necessary that an account stated should cover all the dealings between the parties, or that it should include all the claims between them, and either party may show that the balance found was struck upon a partial, and not a general, accounting.

Public Savings Ins. Co. v. Greenwald, 609, 623 (7).

ACQUIESCENCE—

Additional servitudes, estoppel, see EASEMENTS 4; ESTOPPEL 1.

ADDITIONAL SERVITUDES—

See EASEMENTS 4; ESTOPPEL 1; STREET RAILROADS.

ADMINISTRATORS—

See EXECUTORS AND ADMINISTRATORS.

ADVERSE POSSESSION—

Permissive Use of Land.—Rights Acquired.—A person cannot acquire any right in land as against the owner by a mere permissive use thereof.

Gray v. Blankenbaker, 558, 563 (5).

AGENCY—

See PRINCIPAL AND AGENT.

ALIMONY—

See APPEAL 7.

ALTERNATIVE CAUSE—

Complaint stating, construction, see PLEADING 4.

AMBIGUITY—

See CONTRACTS 1.

AMENDMENT—

Review, amendments deemed made, see APPEAL 73.

APPEAL.

- | | |
|---|--|
| I. APPELLATE JURISDICTION, 1. | IX. REVIEW. |
| II. DECISIONS REVIEWABLE, 2-6. | (a) SCOPE AND EXTENT, 60-74. |
| III. RIGHT OF REVIEW, 7 | (b) PARTIES ENTITLED TO ALLEGE ERROR, 75. |
| IV. PRESENTATION AND RESERVATION IN TRIAL COURT OF GROUNDS OF REVIEW, 8-13. | (c) PRESUMPTIONS, 76-78. |
| V. PERFECTION AND NOTICE OF APPEAL, 14-17. | (d) DISCRETION OF TRIAL COURT, 79. |
| VI. RECORD, 18-30. | (e) QUESTIONS OF FACT, VERDICTS AND FINDINGS, 80-94. |
| VII. ASSIGNMENT OF ERRORS, 31-34. | (f) HARMLESS ERROR, 95-117. |
| VIII. BRIEFS, 35-59. | (g) WAIVER OF ERROR, 118-129. |
| | X. DETERMINATION AND DISPOSITION OF CAUSE, 130-134. |

See also TRIAL.

Appeal from board of county commissioners, see COUNTIES; HIGHWAYS.

Appeal from juvenile courts, see also INFANTS 3, 4.

Appeal from Industrial Board, see also MASTER AND SERVANT 19-65.

Effect of Supreme Court opinion on Appellate Court, see COURTS.

I. APPELLATE JURISDICTION.

1. *Jurisdictional Defects.—Failure to Complete Appeal.*—The failure to perfect a term-time appeal by filing an appeal bond and having the bond approved at the term during which final judgment was rendered is jurisdictional, and is not waived by appellee's failure to object within fifteen days after the time for filing appellant's brief has expired as provided by the act of 1917, Acts 1917 p. 523, §3, §691c Burns' Supp. 1918, for making objections to record and briefs, since such defects, being jurisdictional, do not come within the terms of the act. *Teepe v. Cloud*, 165, 168 (3).

II. DECISIONS REVIEWABLE.

2. *Final Judgment.*—In an action on a note, an entry, "The court * * * now finds for the defendant to which ruling of the court the plaintiff excepts. It is therefore considered, adjudged and decreed by the court that the defendant do have and recover from plaintiff" all his costs, is a final judgment from which an

APPEAL—Continued.

- appeal will lie, since, although incomplete in statement, it disposes of the entire controversy. *Wright, Rec., v. Cohn*, 589, 591 (1).
3. *Finding on Exceptions to Administrator's Report.—Interlocutory Order.—Statutes.*—On exceptions to an administrator's final report, a finding ordering him to file an amended report charging certain advancements is not a final and appealable judgment within the meaning of §671 Burns 1914, §632 R. S. 1881, nor is the order an interlocutory order from which an appeal is authorized by §1392, cls. 15-18, Burns 1914, Acts 1907 p. 237.
Stout v. Stout, Admr., 278, 282 (1).
4. *Finding on Exceptions to Administrator's Report.—"Decision."—Statutes.*—Under §2977 Burns 1914, §2454 R. S. 1881, §2978 Burns 1914, Acts 1913 p. 65, authorizing an appeal by any person aggrieved by any "decision" growing out of any matter connected with a decedent's estate and providing a method for taking such appeals, an appeal will not lie from a decision which is not a final judgment within the meaning of §671 Burns 1914, §632 R. S. 1881, or an appealable interlocutory order within the terms of §1392, cls. 15-18, Burns 1914, Acts 1907 p. 237, the word "decision," as used in §§2977, 2978 being intended to embrace only final judgments and interlocutory orders appealable under the general practice acts.
Stout v. Stout, Admr., 278, 284 (3).
5. *Motion to Set Aside Default Judgment.*—An appeal will not lie from the ruling on a motion to set aside a default.
Indiana State Board, etc. v. Fetrow, 189, 191 (2).
6. *"Final Judgment."*—An appeal governed by §671 Burns 1914, §632 R. S. 1881, authorizing appeals from final judgments only, will be dismissed where the record shows no judgment whatever as to one of the defendants, since a judgment is not final unless it disposes of the subject-matter of the action as to all the parties so far as the court has power to dispose of it.
James v. Wilson, 12, 15 (2).

III. RIGHT OF REVIEW.

7. *Estoppel.—Acceptance of Benefits.*—Where a wife was granted a divorce, with alimony payable in monthly installments, and she ordered an execution on the judgment, the levy of which was enjoined in an action instituted by the husband, the wife's subsequent acceptance of the monthly installments was not an acceptance of benefits under the judgment in the divorce proceeding, and she could, therefore, maintain an appeal from the injunctive decree.
Runyan v. Runyan, 79.

IV. PRESENTATION AND RESERVATION IN TRIAL COURT OF GROUNDS OF REVIEW.

See also 110, 119, 122; PARTIES; PLEADING 15; TRIAL 1.

8. *Presenting Questions for Review.—Objections to Evidence.*—To make alleged error in the admission of evidence available on appeal, the objecting party must state to the trial court, at the time the evidence is offered, the specific objection on which he relies for its exclusion, and only that objection so stated will be considered.
Gray v. Blankenbaker, 558, 567 (10).
9. *Review.—Rulings on Instructions.—Exceptions in Gross.—Effect.*—Where the exception to instructions is in gross, available error cannot be predicated on the giving of such instructions unless all were erroneous. *Van Spanje v. Hostettler*, 518, 527 (8).

APPEAL—Continued.

10. *Presenting Questions for Review.—Objection to Evidence.*—An objection to the admission of evidence that it is irrelevant, incompetent and immaterial, and does not tend to support any of the issues in the case presents no question for review on appeal.
Prudential Ins. Co. v. Dittenbaugh, Admr., 699, 706 (6).
11. *Presenting Questions for Review.—Exclusion of Evidence.*—In order to present error on the refusal of the trial court to admit certain evidence on direct examination, appellant should have made offers to prove at the time the objections were sustained and such facts must be shown by appellant in its brief.
Vandalia Coal Co. v. Butler, 245, 259 (11).
12. *Review.—Argument to Jury.—Reading from Transcript of Evidence.*—It was not error to permit counsel reading to the jury in the course of his argument what he claimed to be a transcript of a part of the evidence furnished by the official reporter, especially where the court instructed the jury not to consider as evidence what was read from such transcript, but to rely solely upon their memory.
Vandalia Coal Co. v. Butler, 245, 259 (12).
13. *Review.—Judgment.—Failure to File Motion to Modify.*—In an action to quiet title, where the judgment was valid as to part of the land involved, the judgment for that reason must stand in the absence of a motion to modify. *Koons v. Burkhardt*, 30, 37 (9).

V. PERFECTION AND NOTICE OF APPEAL.

See also 1.

14. *Notice.—Sufficiency.—Statute.*—Section 681 Burns 1914, §640 R. S. 1881, providing that notice of appeal shall show an appeal from the judgment or some specific part thereof, does not require an appellant to describe particularly the provisions of the judgment from which he appeals unless he questions only a part thereof, so that a notice that a party "has appealed this cause," is in substantial compliance with the statute, and the appeal will be treated as challenging the whole judgment.
Rusk v. Kokomo Steel, etc., Co., 627, 628 (1).
15. *Vacation.—Transcript.—Time for Filing.*—Where judgment was rendered on June 23, 1917, and the motion for new trial was overruled December 15, 1917, appellant had 180 days from the date of the ruling on the motion within which to perfect an appeal, even though he subsequently decided to waive any error in such ruling.
Rusk v. Kokomo Steel, etc., Co., 627, 629 (2).
16. *Time for Perfecting.—Motion to Set Aside Default.—Effect.*—A motion to set aside a default judgment does not have the effect of extending the time for taking an appeal.
Indiana State Board, etc. v. Fetrow, 189, 191 (1).
17. *Term-Time Appeal.—Failure to Perfect.—Dismissal.*—Where at the time the motion for a new trial was overruled, and during the term at which judgment was rendered, an appeal was prayed and the amount of bond fixed, but the appeal bond was not filed and the surety not approved until the succeeding term, and no steps were taken to perfect a vacation appeal, the appeal was not perfected and will be dismissed. *Teepe v. Cloud*, 165, 166 (1).

VI. RECORD.

See also 15; MASTER AND SERVANT 31.

18. *Questions Reviewable.*—On an appeal from a judgment on a note given in settlement of money due under a contract, a ruling

APPEAL—Continued.

sustaining a demurrer to an answer averring that plaintiffs failed to fulfill certain stipulations in the contract cannot be determined where the contract is not in the record.

Hammerton v. J. R. Watkins Medical Co., 515, 518 (3).

19. *Presenting Questions for Review.—Transcript of Proceedings.*—Where appellant fails to present a definite and accurate transcript of the proceedings below showing which of conflicting record entries correctly represented the action of the trial court on a demurrer to a paragraph of reply, no question is presented for review as to the ruling on the demurrer.

Prudential Ins. Co. v. Dffenbaugh, Admr., 690, 704 (5).

20. *Review.—Instructions.*—To authorize a consideration of the action of the trial court in giving and refusing instructions, they must be brought into the record by a substantial compliance with one of the methods provided by statute therefor.

Glasser v. Jones, 192, 195 (6).

21. *Presenting Questions for Review.—Instructions.—Making Part of Record.—Statute.*—Where appellant attempted to save his exceptions with reference to instructions under §561 Burns 1914, Acts 1907 p. 652, providing that the court shall indicate before instructing the jury, by a memorandum in writing at the close of the instructions requested, the numbers of those given and of those refused, and that such memorandum shall be signed by the judge, a failure to comply with the statute is fatal to a consideration of the instructions, and they cannot be identified by marginal notes in the transcript nor by a memorandum following each signed by appellant's attorney. *Glasser v. Jones*, 192, 197 (9).

22. *Presenting Questions for Review.—Instructions.—Making Part of Record.—Filing.*—To make the instructions a part of the record in a civil case without a bill of exceptions, the record must affirmatively show that they were filed in open court, and an order to file appearing in the record is not sufficient to satisfy that requirement.

Glasser v. Jones, 192, 195 (7).

23. *Presenting Questions for Review.—Instructions.—Making Part of Record.—Statute.*—It is essential, in order that requested instructions become a part of the record without a bill of exceptions that the record show that they were filed as required by §558 Burns 1914, §533 R. S. 1881 and §561 Burns 1914, Acts 1907 p. 652.

Glasser v. Jones, 192, 193 (8).

24. *Instructions.—Peremptory.*—A peremptory instruction, to be reviewed on appeal, must be made a part of the record in the manner as other instructions, and it is not sufficient that the record shows that the verdict was directed by the court. (*Davis v. Mercer Lumber Co.* [1904], 164 Ind. 413, distinguished.)

Williams v. Pittsburgh, etc., R. Co., 93, 98 (6).

25. *Instructions.*—Whether an instruction is oral or written, there is no authority for making it part of the record at a succeeding term of court, more than seven months after trial, by an entry ordering that an instruction be made part of the record without a bill of exceptions, and reciting that it was the only instruction in the cause and that it had been dated and filed in open court after being signed by the court and having plaintiff's exception indorsed thereon. *Williams v. Pittsburgh, etc., R. Co.*, 93, 98 (5).

APPEAL—Continued.

26. *Instructions.—Copying into Motion for New Trial.*—Copying an oral instruction into a motion for new trial is not sufficient to make the instruction part of the record.
Williams v. Pittsburgh, etc., R. Co., 93, 98 (4).
27. *Instructions.*—As the act of 1907, Acts 1907 p. 652, in amending the act of 1903, Acts 1903 p. 338, omits the proviso for making oral instructions a part of the record, an entry made in accordance with such proviso did not make an oral instruction part of the record.
Williams v. Pittsburgh, etc., R. Co., 93, 97 (3).
28. *Instructions.*—An entry, "and the court now instructs the jury to return a verdict in favor of the defendant, to the giving of which instruction the plaintiff excepts," is not sufficient to make the instruction part of the record.
Williams v. Pittsburgh, etc., R. Co., 93, 97 (2).
29. *Instructions.*—Instructions not properly in the record will not be considered on appeal.
Williams v. Pittsburgh, etc., R. Co., 93, 96 (1).
30. *Conclusiveness.*—The appellant's contention that his cross-complaint stands unchallenged because no demurrer was ever filed thereto is of no avail on appeal where a recital in the transcript shows that a demurrer was filed and sustained, even though the demurrer is not shown, since such recital must be accepted as true.
Nelson v. Reidelbach, Err., 19, 28 (5).

VII. ASSIGNMENT OF ERRORS.

See also 42, 48, 56-58.

31. *Presenting Questions for Review.*—An assignment of error predicated on overruling a motion to direct a verdict presents no question for review on appeal.
Gray v. Blankenbaker, 558, 561 (2).
32. *Presenting Question for Review.—Insufficiency of Complaint.*—An assignment of error that the complaint does not state facts sufficient to constitute a cause of action presents no question for review on appeal.
Gray v. Blankenbaker, 558, 561 (1).
33. *Presenting Questions for Review.—Ruling on Demurrer.*—The overruling of a demurrer will not be reviewed on appeal where the question is not presented by an assignment of error.
Van Spanje v. Hostettler, 518, 522 (2).
34. *Questions Reviewable.—Insufficiency of Complaint.*—Error assigned on the "Insufficiency of the complaint to state a cause of action," presents no question for review on appeal.
Glaser v. Jones, 192, 194 (1).

VIII. BRIEFS.

See also 1, 118, 123-129.

35. *Waiver of Error.*—The failure of appellant to state in his brief any proposition or point with reference to an alleged error predicated on misconduct of counsel in his argument, as required by Rule 22, cl. 5, of the Appellate Court governing the preparation of briefs, waives such error.
Gray v. Blankenbaker, 558, 567 (11).
36. *Sufficiency.*—Where appellant directs no point or proposition to grounds for a new trial, the brief falls to comply with the rules governing the preparation of briefs and no question is pre-

APPEAL—Continued.

mented for review, and such failure cannot thereafter be used by a discussion of the alleged errors in the argument.

Gray v. Blankenbaker, 558, 565 (8).

37. *Presenting Questions for Review.—Construction.*—The mere statement in appellant's propositions and points that the court erred in giving certain numbered instructions is not a compliance with the rule of court relating to statement of propositions or points in the preparation of briefs and presents no question for review, although such statement is followed by a reference to a number of abstract propositions of law, none of which are applied to any particular instruction challenged.

Gray v. Blankenbaker, 558, 564 (7).

38. *Questions Reviewable.—Sufficiency.*—On an appeal from a judgment for damages against an incorporated town for alleged wrongful destruction of property, where the transcript of the evidence covered 280 pages of the record, but appellant's brief set out only an ordinance involved and notice to plaintiffs to remove the property, a copy of the deed to plaintiffs for the property in controversy, and a condensed recital in six lines of the testimony of the town marshal, who destroyed the property on the order of the town board of trustees, the presentation of the evidence was insufficient under Rule 22 of the Appellate Court governing the preparation of briefs, so that questions, the determination of which require a review of the evidence, cannot be considered.

Town of Bloomfield v. West, 568, 570 (1).

39. *Abstract Propositions of Law.—Questions Presented.*—A proposition in appellant's points and authorities in reference to instructions which is not directed to any particular instruction cannot be aided by reference to appellant's argument and presents no question for review.

Noble County Bank v. DePew, 406, 408 (2).

40. *Abstract Propositions of Law.*—Where appellant's motion for a new trial contains a large number of causes as grounds therefor, and in its brief, under "Points and Propositions," and under the heading of "Ruling on Motion for New Trial," appellant has set out a number of abstract propositions of law, none of which are applied to any specific cause for new trial, no question arising on the ruling on the motion is presented for review.

J. I. Case Threshing Mach. Co. v. Hufford, 606, 608 (1).

41. *Requisites and Sufficiency.—Statute.*—Section 3 of the act of 1917, Acts 1917 p. 523, §691a Burns' Supp. 1918, requiring a liberal construction of briefs, can aid appellant only where a good-faith attempt is made to meet the statutory obligations, but in the absence of any effort by appellant to comply with the statute after the defects in his brief have been pointed out by appellee, the statute cannot aid him.

Rusk v. Kokomo Steel, etc., Co., 627, 631 (4).

42. *Sufficiency.—Abstract Propositions of Law.*—Where appellant's brief, in its points and authorities, set forth numerous propositions of law which were not applied to any particular ruling of the trial court, and also failed to set out any statement of errors relied on for reversal, and its supplemental statement, filed after such defects in the original brief had been pointed out by appellee in his objections to the record and briefs, merely showed that appellant relied on an assignment of error containing eight specifications, but made no attempt to restate the propositions

APPEAL—Continued.

of law or to apply them to the particular rulings in issue, the amended brief was insufficient to present any question for review, notwithstanding the act of 1917, Acts 1917 p. 523, requiring a liberal construction of briefs.

Rusk v. Kokomo Steel, etc., Co., 627, 630, 631 (3).

43. *Presenting Errors.—Review.*—In view of the rules governing the preparation of briefs, the appellant waived any grounds urged in his motion for new trial to which no specific reference was made in the points and authorities of his brief.

Roper v. Cannel City Oil Co., 637, 645 (14).

44. *Failure of Appellee to File Briefs.—Statement of Facts.*—Where no briefs are filed on behalf of appellee, the court on appeal is justified in relying on appellant's statement of what facts the decision of the trial court's denial of the right to a mechanic's lien rested on.

Moore, etc., Lumber Co. v. Scheid, 694, 697 (2).

45. *Dismissal.*—The appellant's failure to file briefs within the time granted, on his petition for an extension of time, requires a dismissal of the appeal.

Union School Tp., etc. v. Brown, 319.

46. *Transcript.—Failure to Point Out.—Waiver.—Statute.*—Under the act of 1917, Acts 1917 p. 523, §3, §691c Burns' Supp. 1918, requiring appellee, within fifteen days after the time for filing appellant's briefs has expired, to file with the clerk of the appellate court his objections to the record and briefs together with a concise statement of his reasons therefor, and providing that failure to do so shall be a waiver of such objections, defects that the transcript contains no marginal notes, and that the briefs partly fail to make proper references to the transcript are waived, when not pointed out as required by the act, and the court may examine the transcript to determine the appeal on its merits.

Teepe v. Cloud, 165, 166 (2).

47. *Rules of Court.—Burden of Showing Error.*—On appeal the duty rests on appellant to show by his briefs in substantial conformity with the rules of court that an error has been committed by the trial court to which he duly excepted at the time, and, failing so to do, he has no right to a reversal of the judgment from which the appeal is taken.

Chastain v. Board, etc., 162, 164 (2).

48. *Waiver of Error.*—An assignment of error not presented in appellant's briefs is waived.

Showers Bros. v. Davis, 227, 229 (1).

49. *Failure to File Briefs.—Effect.*—Appellee's failure to file briefs on the merits of the cause does not, of itself, entitle appellant to a reversal as a matter of right, but only calls for an exercise of the court's discretionary power which should not be exercised against the judgment of the trial court, except where appellant's briefs show that reversible error was in fact committed.

Brayton v. City of Rushville, 238, 242 (4).

50. *Rules of Court.—Scope.*—The rules of the court on appeal with reference to the preparation of briefs are binding upon the court as well as upon litigants.

Brayton v. City of Rushville, 238, 241 (3).

51. *Requisites.*—Appellant's brief must contain, under a separate heading of each error relied on, separately numbered propositions

APPEAL—Continued.

- or points, stated concisely, and without argument or elaboration, as required by Rule 22, cl. 5, of the rules of the Supreme and Appellate Courts. *Brayton v. City of Rushville*, 238, 241 (2).
52. *Review.—Requisites.*—Where error is assigned on the denial of the motion for a new trial, appellant's briefs must show an exception to the ruling of the court and the pages and lines of the record where the filing of the motion and the reserving of an exception to the ruling thereon may be found. *Brayton v. City of Rushville*, 238, 241 (1).
53. *Sufficiency.—Abstract Propositions of Law.*—The statement of a number of abstract propositions of law under the head "Instructions" in appellant's statement of propositions and points is not sufficient to present any question with reference to the trial court's ruling on instructions, since the brief fails to comply with Rule 22, cl. 5, of the rules of the Supreme and Appellate Courts, governing the preparation of briefs. *Vandalia Coal Co. v. Butler*, 245, 260 (13).
54. *Presenting Questions for Review.—Points and Authorities.*—Under Rule 22, cl. 5, of the Supreme and Appellate Courts, providing that no alleged error or point not contained in the statement of points shall be raised afterwards, either by reply briefs or in oral or printed argument, where appellant, in attempting to present rulings on instructions for review, fails to comply with such rule in the preparation of its briefs by not presenting the alleged error in its statement of points, it cannot afterward present such questions by way of argument. *Vandalia Coal Co. v. Butler*, 245, 261 (14).
55. *Waiver of Error.*—Assigned errors which are not mentioned or referred to in the points and authorities in appellant's briefs are waived. *Bright Nat. Bank v. Hanson*, 61, 68 (2).
56. *Assignments of Error.—Sufficiency.*—Where three parties were made defendants to the plaintiff's amended complaint, which contained two paragraphs, and the record shows a separate and several demurrer filed by two defendants to each paragraph of complaint, an assignment of error that "the court erred in sustaining a demurrer to the amended complaint" presents no question for review, and necessitates a dismissal of the appeal, since the appellant is confined to the assignment of error as written. *James v. Wilson*, 12, 14 (1).
57. *Assignments of Error.—Preservation of Grounds.*—A complaint may not be attacked for insufficiency of facts by direct assignment of error on appeal, in view of Acts 1911 p. 415, §348 Burns 1914. *Nelson v. Reidelbach, Err.*, 19, 25 (2).
58. *Assignments of Error.—Waiver.*—Assignments of error relating to the sufficiency of a complaint, and to the ruling on a motion for new trial, are waived by the failure to state any propositions or points relative thereto. *Nelson v. Reidelbach, Err.*, 19, 25, 30 (1).
59. *Sufficiency.—Abstract Propositions of Law.—Waiver of Error.*—Where appellant's brief, under its points and authorities, set forth a number of general statements of facts and abstract propositions of law, but made no reference to the motion for a new trial, nor were such propositions of law specifically applied to any alleged error relied on for reversal, no question is presented for review and any error is waived. *National Council, etc. v. Sims*, 43, 45 (1).

APPEAL—Continued.

IX. REVIEW.

(A) SCOPE AND EXTENT.

See also 80, 92; MASTER AND SERVANT, 22, 34.

60. *Demurrer*.—The court on appeal may look beyond the memorandum filed with a demurrer, as required by Acts 1911 p. 415, §344 Burns 1914, to uphold the ruling of the trial court in sustaining the demurrer. *Nelson v. Reidelbach, Exr.*, 19, 28 (6).
61. *Refusal of Instructions*.—The refusal of tendered instructions was not error, where they were substantially covered by proper instructions in so far as they were applicable.
Gibson v. City of Indianapolis, 89, 92 (3).
62. *Sufficiency of Pleadings*.—*Theory*.—A pleading must proceed on some definite theory which must be determined by its general scope and tenor, and the theory adopted by the trial court and the parties will generally be accepted and followed by the appellate tribunal.
Grand Trunk, etc., R. Co. v. Thrift Trust Co., 198, 207 (2).
63. *Searching the Record*.—The court on appeal will not search the record to reverse, though it may do so to affirm.
Chastain v. Board, etc., 162, 164 (3).
64. *Ruling on Demurrer to Answer*.—Where judgment was rendered against the plaintiff on his refusal to plead further after his demurrers to paragraphs of answer were overruled, the judgment must be affirmed on appeal if one sufficient paragraph of answer was addressed to each paragraph of complaint, even though the ruling were erroneous as to other paragraphs.
Buckel v. Auer, 320, 324 (1).
65. *Rulings on Demurrers*.—*When Reversible Error*.—Where plaintiff sold the minerals under his land but the auditor refused to reduce the valuation thereof for taxation, in an action to recover excess taxes paid, paragraphs of answers alleging that the original valuation was the true cash value of the land, exclusive of coal or other minerals, presented a good defense not provable under defendant's general denial, and the sustaining of demurrers to the answers was reversible error.
Board, etc. v. Riggs, 263, 267 (3).
66. *Rulings on Demurrers*.—The ruling of the trial court sustaining demurrers to paragraphs of answer for want of facts will be sustained on appeal if the answers are insufficient for any reason.
Board, etc. v. Riggs, 263, 267 (2).
67. *Refusal of Instructions*.—In an action for personal injuries, it was not error to refuse requested instructions on the question of contributory negligence where that element, so far as involved, was fully and properly covered by other instructions given.
Oolitic Stone Mills Co. v. Cain, 646, 651 (3).
68. *Ruling on Demurrer*.—Where a demurrer to the complaint was overruled, the only objections available on appeal under §§344, 348 Burns 1914, Acts 1911 p. 415, are those specified in the memorandum accompanying the demurrer.
Federal Life Ins. Co. v. Weedon, Admr., 529, 536 (2).
69. *Refusal of Instructions*.—It is not error to refuse to give requested instructions which are substantially covered by those given.
Van Spanje v. Hostettler, 518, 528 (10).
70. *Admission of Evidence*.—Where error is assigned on the admis-

APPEAL—Continued.

sion of evidence, a ground of objection not stated in the trial court will not be considered on appeal.

Van Spanje v. Hostettler, 518, 528 (11).

71. *Ruling on Demurrer*.—It is only where the demurrer is overruled that the form and substance of the demurrer and memorandum are controlling on appeal.

Hammerton v. J. R. Watkins Medical Co., 515, 517 (2).

72. *Ruling on Demurrer—Insufficient Memorandum—Statute*.—Although §344 Burns 1914, Acts 1911 p. 415, providing that when a demurrer to a complaint is filed for want of facts, a memorandum shall be filed therewith stating wherein the pleading is insufficient, applies to a demurrer to an answer, it is not reversible error to sustain a demurrer to an answer accompanied by an insufficient memorandum if such ruling was correct, since the court on appeal may go behind the memorandum to determine the correctness of the ruling in order to sustain the trial court.

Mutual Life Ins. Co. v. Guller, Gdn., 544, 551 (3).

73. *Complaint—Amendments Deemed Made*.—In an action to quiet title, a judgment for plaintiff will not be reversed because the complaint does not allege that the real estate involved was situated within the state where there was evidence showing that it was so situated, since, in view of §700 Burns 1914, §658 R. S. 1881, providing that no judgment shall be reversed for an imperfection in pleading which might have been amended in the court below, the complaint will be deemed on appeal as having been amended to conform to the evidence.

Gray v. Blankenbaker, 558, 562 (4).

74. *Instructions—Consideration as a Whole—Theory of Case*.—It is proper to present the theory of both parties by instructions within the evidence embodying such theories, and it is unnecessary that the whole law involved be stated in a single instruction where the instructions as a whole state the law correctly.

Gray v. Blankenbaker, 558, 564 (6).

(B) PARTIES ENTITLED TO ALLEGE ERROR.

75. *Exceptions—Identity—Waiver*.—In a servant's action under the federal Employers' Liability Act for injuries sustained in attempting to board a moving train as ordered by his foreman, the objection on appeal that the complaint discloses that the proximate cause of the plaintiff's injury was the slipping of his foot, and not the giving of the order to board the train, is inconsistent with the objection that the plaintiff assumed the risk and was guilty of contributory negligence, urged below in the memorandum to a demurrer challenging the complaint on the ground of insufficiency of facts; hence such objection is of no avail, in view of Acts 1911 p. 415, §344 Burns 1914.

Vandalia R. Co. v. Kendall, 1, 5 (1).

(C) PRESUMPTIONS.

See also 122, 132; **TRIAL 6.**

76. *Rulings of Trial Court*.—In the absence of an affirmative showing of error, the court on appeal may indulge a presumption in favor of the correctness of the rulings of the trial court.

Nelson v. Reidelbach, Err., 19, 29 (7).

77. *Rulings of Trial Court*.—On appeal every reasonable presumption is indulged in favor of the trial court.

Chastain v. Board, etc., 162, 164 (1).

APPEAL—Continued.

78. *Ruling on Motion to Modify Judgment.*—Since the correctness of the ruling on a motion to modify the judgment necessarily depends upon the evidence, and the trial court's decision is not attacked by the motion for a new trial, either upon the ground that it is not sustained by sufficient evidence or that it is contrary to law, it will be assumed on appeal that the evidence is sufficient to warrant the ruling on the motion to modify.

J. I. Case Threshing Mach. Co. v. Hufford, 606, 608 (3).

(D) DISCRETION OF TRIAL COURT.

See also 49, 82; TRIAL 1, 5.

79. *Rulings on Evidence.—Review.*—The court on appeal will not review the action of the trial court in refusing to permit a witness to answer a question which was leading and called for a conclusion, unless such refusal was an abuse of the broad discretion of the court in controlling the reception of the evidence.

Roper v. Cannel City Oil Co., 637, 645 (12).

(E) QUESTIONS OF FACTS, VERDICTS AND FINDINGS.

80. *Evidence.—Sufficiency.—Scope of Review.*—In determining the sufficiency of the evidence, the court on appeal will consider only the evidence tending to support the verdict.

Williams v. Pittsburgh, etc., R. Co., 93, 99 (7).

81. *Verdict.—Conclusiveness.*—The jury's verdict is conclusive on appeal if there is any evidence to sustain it.

Gibson v. City of Indianapolis, 89, 92 (2).

82. *Evidence.—Admissibility.—Discretion of Court.*—In an action against the master by a mine worker for injuries sustained when his hand was crushed under a mine car, it was within the discretion of the trial court, and, in the absence of proof of an abuse thereof, not reversible error to permit plaintiff's witnesses to testify as to the customs and rules of the master's mine, including conversations with, and directions of, the mine boss and boss driver, and to detail incidents by which they became acquainted with such customs and rules, notwithstanding the existence thereof was admitted by the master.

Vandalla Coal Co. v. Butler, 245, 256 (5).

83. *Verdict.—Conclusiveness.*—Where there is some evidence to sustain the findings of the jury they are conclusive on appeal.

Showers Bros. Co. v. Davis, 227, 236 (5).

84. *Conflicting Evidence.*—The court on appeal will not weigh conflicting evidence.

Prudential Ins. Co. v. Dittenbaugh, Admr., 699, 708 (10).

85. *Evidence.—Sufficiency.*—Where there is evidence tending to sustain the finding of the trial court on all material questions, the finding will not be disturbed on appeal for insufficiency of evidence.

City of Huntingburg v. Fisher, 665, 668 (1).

86. *Verdict.—Evidence.*—Where there is some evidence to sustain the verdict as to every material issue tendered, the evidence will be held sufficient on appeal.

Roper v. Cannel City Oil Co., 637, 643 (9).

87. *Rulings on Evidence.—Reasons.*—If the ruling of the trial court in excluding evidence can be sustained for any reason, it will not be ground for reversal on appeal.

Roper v. Cannel City Oil Co., 637, 644 (10).

88. *Evidence.—Sufficiency.*—The court on appeal, in determining

APPEAL—Continued.

the sufficiency of the evidence, is limited to a consideration of that most favorable to the appellee, including such inferences in its favor as the jury might have reasonably drawn therefrom.

Roper v. Cannel City Oil Co., 637, 641 (6).

89. *Evidence.—Insufficiency.—Necessity for New Trial.*—In an action to recover for support, care and services rendered decedent, where the evidence showed that certain services were rendered by a son for which he was entitled to recover but there was no proof as to the value thereof, so that the judgment for plaintiff was too large, the case should be remanded for a new trial rather than that a remittitur be ordered for the items not sustained by the evidence.

Zoellers v. Lot, Admr., 395, 399 (3).

90. *Evidence.—Sufficiency.*—A verdict will not be disturbed on appeal for insufficiency of evidence where there is some evidence to sustain it.

Van Spanje v. Hostettler, 518, 524 (4).

91. *Evidence.*—The jury's finding will not be disturbed on appeal where sustained by some evidence, although such evidence may have been strongly contradicted and not entirely satisfactory.

Van Spanje v. Hostettler, 518, 527 (7).

92. *Sufficiency.—Scope of Review.*—In determining whether there is any evidence to support the finding of the trial court, the court on appeal must consider not only that which may be said to be direct, but also all reasonable inferences which the trial court may have drawn.

Public Savings Ins. Co. v. Greenwald, 609, 615 (3).

93. *Evidence.—Sufficiency.*—If there is any evidence to sustain the trial court's finding, it is sufficient on appeal, although such evidence may be strongly contradicted and not entirely satisfactory.

Public Savings Ins. Co. v. Greenwald, 609, 615 (2).

94. *Evidence.*—Where the evidence is conflicting the court on appeal will merely determine whether there is any evidence to sustain the verdict.

Gray v. Blankenbaker, 558, 566 (9).

(F) HARMLESS ERROR.

See also RAILROADS 28.

95. *Refusal of Instructions.—Cure by Verdict.*—Where, in an action on notes given for the purchase price of goods, defendant buyer claimed a rescission of the sales contract for fraud, a refusal to instruct that he must restore or offer to restore everything of any value received under the contract was harmless, since the jury, in returning a verdict for defendant, must necessarily have found that the property for which the notes were given was of no value.

Bright Nat. Bank v. Hanson, 61, 78 (11).

96. *Instructions.—Cure by Verdict.*—In an action on notes given for the purchase price of goods, where defendant buyer claimed a rescission of the sales contract for fraud, an instruction that the amount of plaintiff's recovery might be reduced by the difference between the fair market value of the property received and its value if it had been as represented, was harmless, where the jury, in returning a verdict for defendant, must necessarily have found that the property was valueless.

Bright Nat. Bank v. Hanson, 61, 78 (12).

97. *Admission of Evidence.*—Error, if any, in permitting an agent to testify as to the agency relationship was harmless, where there was other uncontradicted evidence establishing the fact.

Bright Nat. Bank v. Hanson, 61, 75 (7).

APPEAL—Continued.

98. *Failure to Assess Nominal Damages.*—A judgment will not be reversed for failure to assess nominal damages.

Williams v. Pittsburgh, etc., R. Co., 93, 102 (12).

99. *Instructions.—Fraud.—Measure of Damages.*—Where the jury, in an action for fraud in exchange of horses, found that the mare received by plaintiff was of no value at the time of the trade, but failed to find her value had she been as represented, it does not affirmatively appear that an erroneous instruction that the measure of damages was the difference between the value of the horses was harmless to defendants.

Mowes v. Robbins, 82, 86 (4).

100. *Admission of Evidence.*—In an action for personal injuries sustained in a mine accident, the admission of certain evidence to prove a custom or rule in the master's mine, even though erroneous, was harmless, where such rule was established not only by competent evidence, but was expressly admitted by the master.

Vandalia Coal Co. v. Butler, 245, 256 (6).

101. *Refusal of Instructions.*—The refusal of requested instructions on subjects fully covered by instructions given is harmless.

Showers Bros. Co. v. Davis, 227, 236 (6).

102. *Instructions Outside Issues.*—In an action against a railroad company for the death of a servant killed by a collision between an engine and a flat car on which he was standing, an instruction that defendant was not bound to ring the bell in shifting and coupling an engine to cars in the yard, although inapplicable to the evidence, was not prejudicial to defendant.

Grand Trunk, etc., R. Co. v. Thrift Trust Co., 198, 219 (10).

103. *Refusal of Instructions.—Contributory Negligence.*—Where, in an action for wrongful death, the instructions on contributory negligence precluding recovery in event the jury found that decedent was guilty of such negligence, and the general finding was for plaintiff on that issue, any error from refusal to give defendant's tendered instructions on the same subject was harmless, such tendered instructions being less favorable to defendant than those given.

Grand Trunk, etc., R. Co. v. Thrift Trust Co., 198, 217, 226, (8).

104. *Instructions.*—Where, under the state law, contributory negligence was a complete bar to recovery for the death of a railroad employe and under the federal Employers' Liability Act of 1908, 35 Stat. at L. 65, §§8657-8665 U. S. Comp. Stat. 1913, was a ground for reducing damages only, instructions in an action for the wrongful death of a railroad employe, applying the state law on the issue of contributory negligence could not have harmed defendant, the law applicable to all other issues involved being the same under either the federal or state law.

Grand Trunk, etc., R. Co. v. Thrift Trust Co., 198, 216, 226 (6).

105. *Instructions.—Contributory Negligence.*—In an action against a railroad company for the death of an employe killed by a collision between an engine and a flat car, an instruction that if the decedent was in the exercise of ordinary care "immediately prior" to the collision, there could be a recovery, was not prejudicial to defendant, where it appeared that decedent did not have time to take a position of safety on the car and whatever was done by him which could have constituted contributory negligence must have been done during the period intervening between the time he got on the car and the time he was injured, which was

APPEAL—Continued.

about one minute, so that he could not have been guilty of any negligence from the time he got on the car up and including the time of his injury which he was not guilty of immediately before the accident.

Grand Trunk, etc., R. Co. v. Thrift Trust Co., 198, 221 (13).

106. *Instruction*.—In an action for injuries sustained by a ten year old child in a crossing accident, where the defendant tendered an instruction that if it failed to give statutory signals, but did give other warnings of the approach of the train, the plaintiff could not recover, the error, if any, in an instruction as to the defendant's statutory duty to give warning signals, was one of which the defendant may not complain, the error having been invited. *Chicago, etc., R. Co. v. Barnes*, 354, 369 (13).

107. *Instruction*.—In an action for injuries sustained by a child in a crossing accident, an instruction submitting the question whether the child made such use of her physical senses for her own protection as should reasonably be expected of other children of like age, experience and intelligence, though incomplete for failing to limit the conduct of such other children to similar circumstances, was not reversible error, in view of the language of the entire instruction.

Chicago, etc., R. Co. v. Barnes, 354, 366 (11).

108. *Admission of Evidence*.—In an action on a life policy, where defendant insurer contended that the designated beneficiaries were the executor or administrator of insured's estate and the jury found in accordance with such contention, the admission in evidence for plaintiff, insured's son and executor, who claimed that he was personally the beneficiary, of a copy of the policy in which a beneficiary was not named, was harmless.

Prudential Ins. Co. v. Dittenbaugh, Admr., 690, 707 (8).

109. *Dismissal*.—In an administrator's action to sell real estate to pay debts, where defendants brought a cross action to quiet title to the land involved, the dismissal of plaintiff's petition was in effect an adjudication that plaintiff had no claim against the real estate, and cross-complainants were not harmed by failure of the trial court to render judgment quieting title as against plaintiff.

Smith v. Linton Trust Co., 691, 694 (2).

110. *Issues Without Pleadings*.—*Failure to Object*.—*Affirmance*.—Where issues not presented by the pleadings have been tried by the parties without objection and a correct result reached on any view of the case, and it affirmatively appears that intervening errors, if any, were harmless, the judgment will be affirmed.

Boyd v. Miller, 454, 465 (9).

111. *Admission of Evidence*.—*Cure by Instruction*.—In an action for the possession of real estate, error, if any, in permitting plaintiff, grantor of the land in controversy, to testify that she believed a line fence to be the boundary line and that it was her intention to sell only to the fence, was cured by an instruction expressly withdrawing evidence of that character from the jury's consideration.

Boyd v. Miller, 454, 457 (1).

112. *Instructions*.—*Misplacing Burden of Proof*.—In an action on a note given for corporate stock, where defendant made no offer to restore the stock, and the evidence showed that it had a substantial value when purchased, a finding against him on his answer of fraud in the procurement of the note was right, so

APPEAL—Continued.

that an instruction improperly placing the burden of proof on the issue upon him was harmless.

Brumbaugh v. Mellinger, 410, 415 (7).

113. *Instruction Misplacing Burden of Proof.—When Harmless.*—The giving of an instruction which places the burden of an issue on the wrong party is generally reversible error, but a judgment will not be reversed for such error where the record affirmatively shows that it was harmless.

Brumbaugh v. Mellinger, 410, 414 (3).

114. *Variance.—Statute.*—Under the provisions of §400 Burns 1914, §391 R. S. 1881, an alleged variance between pleading and proof regarding the name of an insurance company, whose policies defendant company reinsured, will be deemed immaterial where it is not shown that defendant was misled to its prejudice in maintaining its defense upon the merits.

Federal Life Ins. Co. v. Weedon, Admr., 529, 539 (7).

115. *Ruling on Demurrer.*—Error, if any, in sustaining a demurrer to a special answer, is harmless where all the material facts properly pleaded therein were admissible under the general denial.

Federal Life Ins. Co. v. Weedon, Admr., 529, 538 (5).

116. *Repetition of Instruction.*—The single repetition of a correct proposition of law in the course of nearly thirty instructions does not constitute reversible error, even though not good practice.

Town of Bloomfield v. West, 568, 574 (6).

117. *Instructions.*—In an action against a municipal corporation for the wrongful destruction of a building, defendant cannot complain of an instruction failing to point out the effect of a private abatement of a nuisance which is about to become the object of municipal action, since the omission, if error, operated in its favor.

Town of Bloomfield v. West, 568, 574 (7).

(G) WAIVER OF ERROR.

See also 1, 15, 35, 43, 48, 55, 58, 59, 75; PLEADING 11.

118. *Briefs.*—Grounds for a new trial are waived where applicant fails to direct a point thereto in its brief.

Vandalia Coal Co. v. Butler, 245, 257 (8).

119. *Exclusion of Evidence.—Sustaining Objections.—Failure to State Grounds of Objection.*—That the trial court sustained objections to the admission of evidence without any grounds for the objections being given does not render the rulings erroneous, since, where evidence is excluded it is not necessary that the grounds of objection should appear, as it is immaterial whether any objection was advanced at the time of the ruling.

Vandalia Coal Co. v. Butler, 245, 258 (9).

120. *Harmless Error.—Ruling on Motion to Strike Out.*—A judgment will not be reversed because of the overruling of a motion to strike out allegations from the complaint, especially where the appellant fails to show in his brief that any evidence was submitted on such allegation and in view of the fact that the instructions limited the jury's consideration of the complaint to a theory not involving the objectionable allegations.

Vandalia Coal Co. v. Butler, 245, 253 (3).

121. *Harmless Error.—Admission of Evidence.—Cure by Instruction.*—In a servant's action for personal injuries, error, if any, in the admission of evidence as to the expectancy of life of the plaintiff, a boy fourteen years of age, and the amount of his

APPEAL—Continued.

earnings per day, was cured by an instruction that, in assessing damages, his ability to earn money and a livelihood after, but not before, he reached the age of twenty-one years, should be considered. *Vandalia Coal Co. v. Butler*, 245, 257 (7).

122. *Complaint for Injuries to Servant.—Failure to Demur.—Presumptions.—Sufficiency of Evidence.*—In an action against a railroad company for the death of a servant, where defendant, in the memorandum accompanying its demurrer failed to include, as one of its grounds, that the complaint failed to aver that decedent was engaged in interstate commerce when injured, it cannot on appeal raise that objection by its contention that the cause of action is not proved because the uncontradicted evidence shows that decedent was so employed, where the facts pleaded in such complaint state a cause of action under either the state or federal statute, except that to make the complaint sufficient under the federal law it was necessary to have alleged that decedent was engaged in interstate commerce, and in such a case the trial court should treat the complaint as amended to correspond with the proof, and, on its failure to do so, the court on appeal may so treat the complaint.

Grand Trunk, etc., R. Co. v. Thrift Trust Co., 198, 213 (4).

123. *Briefs.*—Grounds for a new trial are waived by appellant's failure to address any proposition or point thereto in his brief. *Glasser v. Jones*, 192, 195 (5).

124. *Briefs.*—Where no reference, either express or implied, is made in appellant's points and authorities to a ground of the motion for new trial, which was overruled, such ground is waived. *Barley v. Sansberry*, 132, 142 (1).

125. *Briefs.*—Specifications in a motion for a new trial are waived by appellant's failure to refer thereto in the statement of points and authorities in its brief.

Prudential Ins. Co. v. Dittenbaugh, Admr., 699, 709 (13).

126. *Briefs.*—Where no point or proposition is stated in appellant's brief in regard to the alleged insufficiency of the complaint, the error, if any, in overruling the demurrer thereto is waived.

Oolitic Stone Mills Co. v. Cain, 646, 649 (1).

127. *Briefs.—Failure to Cite Authorities.*—Where appellant's brief, under its propositions and points, contains but the bare statement of an alleged error, without any excuse for not supplying authority in its support, the error is waived.

J. I. Case Threshing Mach. Co. v. Hufford, 606, 608 (2).

128. *Briefs.*—Questions not presented in the propositions and points in appellant's briefs are waived.

Brumbaugh v. Mellinger, 410, 413 (1).

129. *Briefs.*—Alleged error in the admission of evidence is waived by the failure of appellant, in its statement of the record, to point out the page and line of the transcript at which the rulings complained of may be found.

Noble County Bank v. DePew, 406, 408 (1).

(X) DETERMINATION AND DISPOSITION OF CAUSE.

See also 110.

130. *Review.—New Trial.*—Where appellant asks that the trial court be directed to restate its conclusions of law on the facts found and render judgment accordingly, but the record discloses that the rights of other parties might thus be improperly affected,

APPEAL—Continued.

the ends of justice are better served by ordering a new trial as authorized by §702 Burns 1914, §660 R. S. 1881.

Moore, etc., Lumber Co. v. Scheid, 694, 699 (6).

131. *Misleading Instruction.—Reversible Error.*—Where, in a suit for recovery of the purchase price of a carload of apples, the issue was merchantability at the place of shipment, it was reversible error to instruct in effect that, if the apples were not fit for use in the market, there was a breach of the contract of implied warranty, since the language tended to confuse the jury as to the place of merchantability. *Rinelli v. Rubino*, 314, 318 (3).

132. *Reversal.—Grounds.—Presumption.*—Not every error committed by the trial court will furnish a ground for reversal, but only such as are prejudicial to appellant.

Grand Trunk, etc., R. Co. v. Thrift Trust Co., 198, 215 (5).

133. *Excessive Damages.—Reversal.*—Where the amount of a verdict in an action for wrongful death is not so large as to show that the jury was influenced by bias or prejudice in making the award, the judgment will not be reversed on the ground that the verdict was excessive.

Grand Trunk, etc., R. Co. v. Thrift Trust Co., 198, 217 (9).

134. *Review.—Instructions.—Fraud.—Measure of Damages.—Erroneous Instruction.—Cure by Remittitur.*—On an appeal from a judgment for plaintiff in an action for fraud, reversal for an erroneous instruction as to the measure of damages cannot be avoided by remittitur of part of the amount recovered, when the record furnishes no definite basis for determining the amount, if any, which should be remitted. *Mowes v. Robbins*, 82, 87 (5).

APPROPRIATIONS—

See COUNTIES; MUNICIPAL CORPORATIONS 3.

ARGUMENT—

To jury, review, see APPEAL 12.

ASSESSMENTS—

Payment, time, waiver, see INSURANCE 2.

Street improvements, apportionment, see MUNICIPAL CORPORATIONS 12-17.

ASSIGNMENT OF ERRORS—

See APPEAL 31-34.

ASSIGNMENTS—

See also EXECUTION 1, 2.

1. *Contracts.—Personal Confidence.*—An answer in a foreclosure action that the mortgagee had agreed to dismiss the action upon the satisfaction of certain liens by the mortgagor, and that the agreement had been assigned to the defendant, was demurrable, in view of the rule that rights arising out of a contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence, such that the party conferring the rights intended that they should be exercised only by the party in whom the confidence was placed.

Nelson v. Reidelbach, Exr., 19, 27 (4).

2. *Executory Contract.—Validity.—Statute.*—Under §9071 Burns 1914, §5501 R. S. 1881, providing that all written promises shall

ASSIGNMENTS—Continued.

be negotiable by indorsement, a valid, subsisting executory agreement in writing for the improvement of a sidewalk may be assigned by the contractors for the work, even though no payment was due them at the time the assignment was made.

Beckman Supply Co. v. Newell, 679, 687 (5).

ATTORNEY-GENERAL—

Right to Sue in Name of State.—Statutes.—Under §9269 Burns 1914, Acts 1889 p. 124, and §9270 Burns 1914, Acts 1899 p. 219, providing that the Attorney-General shall prosecute all suits brought by the state, the Attorney-General has such an interest in the subject-matter of an action by the state to enjoin the removal of sand and gravel out of Lake Michigan within the state as to authorize the bringing of such action on his relation.

Lake Land Co. v. State, ex rel., 439, 442 (1).

AUTHENTICATION—

Records, admissibility, see EVIDENCE 10.

BANKS AND BANKING—

1. *Forged Check.—Payment to Bona Fide Holder.—Recovery.*—Where a check purporting to have been drawn by a depositor is presented to a bank by a *bona fide* holder for value and without fault, and is paid by the bank, it cannot, if it subsequently discovers that the check is forged, recover the payment so made.

Commercial, etc., Bank Co. v. Citizens Nat. Bank, 417, 423 (1).

2. *Forged Check.—Collection by Bank.—Rights Between Banks.*—Where a check was presented to a bank for payment by a stranger, and the bank, though not actually paying the check stamped "Paid" on the face thereof, and on the back "Pay any Bank or Banker. All previous endorsements guaranteed," attaching a slip, "We enclose for collection and return," and sent the check to drawee bank which paid it, and, subsequently after the forwarding bank had paid the proceeds to its customer, the drawee discovered that the depositor's signature and indorsement were forged, the drawee bank could not recover the proceeds of the check from the forwarding bank, since the negligence of both banks contributed to the loss and, in such a case, the loss will be allowed to remain where it has been placed by the course of business.

Commercial, etc., Bank Co. v. Citizens Nat. Bank, 417, 437 (2).

BELIEF—

Element of right of recovery, proof, see FRAUD 4.

BENEFITS—

Acceptance, estoppel, see APPEAL 7; DEEDS 1.

Under will, ratification, see WILLS.

BILLS AND NOTES—

See also BANKS AND BANKING; CORPORATIONS; HUSBAND AND WIFE 4; SALES 1-3.

1. *Actions.—Defenses.—Fraud.—Pleading.—Bona Fides.—Burden of Proof.*—In an action by an assignee of notes against the maker, an answer setting up that the execution of the notes was pro-

BILLS AND NOTES—Continued.

cured by fraud is sufficient without an allegation that plaintiff had knowledge of, or connection with, the fraud averred, since, when a note is shown to have been obtained by fraud, the holder must show that he took it before maturity, without notice and for a valuable consideration.

Bright Nat. Bank v. Hanson, 61, 70 (3).

2. *Action on Note.—Defenses.—Pleading Fraud.*—In an action on notes, an answer of fraud alleging that plaintiff, the holder of the notes, united with the payee, an administratrix, in fraudulently inducing defendant to execute them is good as against demurrer, even though the estate of the administratrix may not have been bound by her false representations.

Bright Nat. Bank v. Hanson, 61, 68 (1).

3. *Bona Fide Owner.—Evidence.*—In an action by assignee bank on a note embodying a conditional contract of sale of live stock under which the payee of the note, or holder thereof, might retake and sell the live stock on failure to pay when due, evidence showing that, on default in payment, the payee retook and sold the cattle for which the instrument was given and entered credit on the note at the bank, and that the bank cashier or his assistant informed defendant's attorney in response to an inquiry about the note that he must see the payee, as the bank had nothing to do with the instrument, was sufficient to warrant the inference that the bank was not the *bona fide* owner of the note.

Noble County Bank v. DePew, 406, 408 (3).

4. *Burden of Proof.—Fraud or Illegality.*—Where fraud in the procurement of a note is set up as a defense in a suit thereon by an indorsee, the burden is on the plaintiff to show his protection from such defense as a good-faith purchaser for value before the maturity of the note.

Brumbaugh v. Mellinger, 410, 413 (2).

5. *Promissory Note.—Explaining Contract.—Parol Evidence.—Admissibility.*—In an action on a promissory note, where defendant answered that he signed the note at the request of the payee bank's president as surety for him, and that there was an understanding between the parties that the note should not become binding until signed by the president, which was never done, a question asking defendant's brother what defendant and the president said about the note was not objectionable as seeking to vary or explain the terms of a written contract by parol.

Wright, Rec., v. Cohn, 588, 592 (3).

BONA FIDES—

See **BANKS AND BANKING** 1; **BILLS AND NOTES** 1, 3.

BONDS—

Approval, payment of salary, see **MUNICIPAL CORPORATIONS** 1.

Filing, perfection of appeal, see **APPEAL** 1, 17.

Guardian's bond, action, see **INSANE PERSONS**.

BOUNDARIES—

See also **ESTOPPEL** 2.

1. *Location.—Question of Law and Fact.*—What constitutes a boundary line is a question of law, but the location thereof is a question of fact.

Boyd v. Miller, 454, 462 (5).

BOUNDARIES—Continued.

2. *Location.—Evidence.—Jury Question.*—In an action for possession of real estate involving a boundary line, evidence as to the length of time a fence had been in existence and the use and occupation of the realty in dispute with reference thereto and as to discrepancies between an original city plat and different surveys, *held* sufficient to present the issue whether such fence marked the boundary line in controversy.
Boyd v. Miller, 454, 460 (4).
3. *Location.—Parol Evidence.—Admissibility.—Varying Deed.*—In an action for possession of real estate involving a boundary, where there was a dispute as to the width of several streets, evidence showing that there was a surplus in the block and that a certain fence was the true boundary between the lots involved, was not objectionable as tending to vary a deed conveying with reference to the plat, but was properly admitted to apply to the land conveyed thereby.
Boyd v. Miller, 454, 462 (6).
4. *Pleading.—Issues.—Grant in Accordance to Plat.*—In an action for the possession of real estate involving a boundary, if the only description of the realty in the pleadings was by reference to the official plat, there would be no issue as to an agreed boundary line, since the plat would control.
Boyd v. Miller, 454, 458 (2).
5. *Pleading.—Issues.—Instructions.—Agreed Boundary.*—In an action for the possession of real estate involving a boundary, where the complaint alleged that a line fence was on the boundary line in controversy, that defendants bought with reference to the fence as a boundary and had used only to such fence, and that immediate and remote grantors of the parties to the action had recognized the fence as the true boundary, instructions as to the recognition of the fence as the boundary were within the issues.
Boyd v. Miller, 454, 459 (3).

BREACH—

Of sale contract, action, damages, see **SALES 4-14.**

BRIEFS—

See **APPEAL 35-59.**

BURDEN OF PROOF—

See **EVIDENCE.**

CARRIERS—

1. *Carriage of Live Stock.—Delay in Shipment.—Proof of Damages.*—In an action by a shipper against a railroad company for delay in transporting live stock, even though the evidence established unreasonable delay, the shipper could not recover where there was no evidence from which the actual damages sustained could be ascertained.
Williams v. Pittsburgh, etc., R. Co., 93, 99 (8).
2. *Carriage of Live Stock.—Delay in Shipment.—Measure of Damages.—Proof.*—The measure of damages for unreasonable delay in the shipment of live stock or goods, in the absence of a contract in that regard, is the difference between the market value at their destination when they should have arrived and the value at actual delivery, and, in an action to recover for

CARRIERS—Continued.

delay in transporting a shipment of horses, the requirements of such rule are not satisfied by evidence showing the value of the horses when placed in the cars and their value on their arrival at the point of destination.

Williams v. Pittsburgh, etc., R. Co., 93, 100 (9).

CASES—

Cited, see p. vi.

Reported, see p. iii.

Distinguished, see APPEAL 24; MASTER AND SERVANT 56.

CERTIFICATES—

Corporate stock, action, failure to deliver, necessity of restoration of stock, see CORPORATIONS 2.

CESTUI QUE TRUST—

Disavowal of trust, proof, see TRUSTS 1.

CHECKS—

See BANKS AND BANKING.

CHILD—

See INFANTS; NEGLIGENCE 2, 3; PARENT AND CHILD; RAILROADS 3-6.

Personal injuries, adequacy of damages, see DAMAGES 2.

CITIES—

See MUNICIPAL CORPORATIONS.

COLLATERAL ATTACK—

See HIGHWAYS 1-3; MUNICIPAL CORPORATIONS 12.

COMMISSIONERS—

County, see COUNTIES; HIGHWAYS.

COMPENSATION—

Workmen's, see MASTER AND SERVANT 19-65.

COMPLAINT—

See PLEADING.

Insufficiency, assignment of error, see APPEAL 32, 34, 57.

COMPROMISE AND SETTLEMENT—

Note Given in Settlement of Claims.—Presumption.—Where a note was given in settlement of claims arising out of a contract, it must be presumed, in the absence of a showing to the contrary, that all controversies relating to such contract were thereby extinguished.

Hammerton v. J. R. Watkins Medical Co., 515, 518 (4).

CONCEALMENT—

Fraudulent, action, accruing of cause, see FRAUD 1.

Of liability, effect, see LIMITATION OF ACTIONS 1.

CONCLUSIONS—

Of witness, questions, see WITNESSES 1.

CONDITIONAL SALES—

To infant, adult joint obligor, avoidance, see **INFANTS** 5.
Construction, enforcement, see **MORTGAGES** 4.

CONSENT—

As consideration, see **CONTRACTS** 4.

CONSIDERATION—

See **CONTRACTS** 4; **LICENSES** 1; **RAILROADS** 11; **REFORMATION OF INSTRUMENTS**.

Return, when unnecessary in rescinding, see **SALES** 17.

CONSTRUCTION—

See **CONTRACTS** 1; **DEEDS** 4, 5; **INSURANCE** 1, 7; **STATUTES**.

CONSTRUCTIVE TRUSTS—

See **TRUSTS** 2.

CONTRACTS—

See also **APPEAL** 18; **ASSIGNMENTS**; **BILLS AND NOTES**; **CORPORATIONS**; **EVIDENCE** 9; **EXECUTION** 1, 2; **EXECUTORS AND ADMINISTRATORS** 1; **HIGHWAYS** 9; **INFANTS** 5-7; **INSURANCE**; **MASTER AND SERVANT** 19, 46; **MORTGAGES**; **MUNICIPAL CORPORATIONS** 3, 4; **PARTNERSHIP**; **RAILROADS** 11, 12; **SALES**.

1. *Construction.—Ambiguity.*—Where a contract is uncertain or ambiguous resort may be had to extraneous facts and circumstances, as well as to the practical construction given to the contract by the parties.

Mobley v. J. S. Rogers Co., 308, 312 (2).

2. *Construction.—Extrinsic Evidence.—Questions of Law and Fact.* Where extraneous facts and circumstances are resorted to for the purpose of explaining an ambiguous contract, the question of construction becomes one of mixed law and fact.

Mobley v. J. S. Rogers, 308, 312 (2).

3. *Fraud.—Liability.*—Where a person designedly or knowingly causes a false impression or belief to be entertained by another and the latter is thereby induced to make a contract injurious to his interests or to perform a valuable service to the one guilty of the deception on the credit of another, such deception constitutes actionable fraud. *Van Spanje v. Hostettler*, 518, 524 (3).

4. *Valuable Consideration.*—The mere withdrawal of an objection which there is no legal right to interpose, or consent given to do something which may be legally done without such consent, does not afford a sufficient consideration to support a contract.

Vandalia R. Co. v. Fort Wayne, etc., Traction Co., 120, 130 (5).

5. *Written.—Explaining.—Parol Evidence.*—In an action by one partner against another for breach of a partnership contract for the purchase of an automobile factory, which contained an option for the repurchase of the plant by its former owner, parol evidence as to the option was admissible to explain the situation of the parties when their written contract was executed, where such evidence in no way changed the provisions of the written agreement, but only purported to make clear certain references therein.

Barley v. Sansberry, 132, 148 (4).

CONTRIBUTORY NEGLIGENCE—

See NEGLIGENCE.

CONVEYANCES—

See DEEDS.

CORPORATIONS—

See also FRAUD 4; MUNICIPAL CORPORATIONS.

1. *Sale of Stock.—Action on Purchase Note.—Defense of Fraud.—Restoration of Stock.*—In an action on a note given for the purchase price of corporate stock, defendant, in the absence of an offer to restore the stock, could not prevail on the ground of fraud inducing the purchase unless the stock was worthless at the time he bought it. *Brumbaugh v. Mellinger*, 410, 415 (6).
2. *Stock Certificates.—Failure to Deliver.—Restoration of Stock.*—Certificates of corporate stock are not the stock and do not constitute the title thereto, but are merely evidence of a purchaser's title, so that, in an action on a note given for corporate stocks, the purchaser was bound to make restoration to avoid payment of the note for fraud, even though he had never received the certificate. *Brumbaugh v. Mellinger*, 410, 416 (8).

COUNTERCLAIM—

By receiver, permission, see RECEIVERS; SET-OFF AND COUNTERCLAIM.

COUNTIES—

See also HIGHWAYS.

General Funds.—Appropriations.—Award of Damages.—Liability of County.—Statute.—Under §5944 Burns 1914, Acts 1899 p. 343, providing that no court can bind the county except by judgment rendered in a cause where such court has jurisdiction of the parties and the subject-matter, except to the extent of money already appropriated and available for the purposes which the court is seeking to accomplish, and that any action of the court in violation of such statute shall be absolutely void, an order of the circuit court, on appeal from an order of the board of county commissioners establishing a highway, that the damage be paid out of the county treasury was void where the county was not a party to the proceeding and no appropriation of funds had been made. *Weaver v. Ferguson*, 169, 184 (7).

COURTS—

See also APPEAL; COUNTIES; HIGHWAYS; INFANTS; JUSTICES OF THE PEACE.

Rule of Decision.—Decision of Supreme Court.—The decisions of the Supreme Court are binding upon the Appellate Court, except as provided in §1394, cl. 1, Burns 1914, Acts 1901 p. 565, authorizing either division of the Appellate Court to transfer a case to the Supreme Court where two of the judges of such division are of the opinion that a ruling precedent of the Supreme Court is erroneous. *Stout v. Stout, Admr.*, 278, 282 (2).

CROSS-COMPLAINT—

Title, pleading, see QUIETING TITLE.

CROSS-EXAMINATION—

See WITNESSES 2.

CROSSINGS—

See **APPEAL 107; DAMAGES 2; RAILROADS.**

DAMAGES—

See also **APPEAL 98, 99, 133; CARRIERS; COUNTIES; FRAUD 2, 3, 5; HIGHWAYS 1-4, 8, 9; NEGLIGENCE; RAILROADS; SALES 3, 4, 7, 11.**

1. *Actions in Tort.—Scept of Recovery.*—In actions sounding in tort there may be a recovery for all damages which naturally and proximately result from the wrong done.

Mowes v. Robbins, 82, 86 (2).

2. *Adequacy.—Personal Injuries.*—Where a ten year old child was struck by a train at a highway crossing, and sustained a fracture of a collar bone, and the bone of the forearm, a cut on the head and various other wounds and bruises, a verdict of \$1,200 was not excessive. *Chicago, etc., R. Co. v. Barnes*, 354, 370 (14).

3. *Evidence.—Question for Jury.*—A jury must be furnished data from which it can estimate the extent of damages, and where there is a failure in this regard there can be no recovery.

Williams v. Pittsburgh, etc., R. Co., 93, 101 (10).

DEBTOR AND CREDITOR—

See **ACCOUNT STATED; EXECUTION 1, 2.**

Husband's creditors, rights as to interest in wife's lands, see **HUSBAND AND WIFE 10.**

DECEDENTS' ESTATES—

See **EXECUTORS AND ADMINISTRATORS.**

"DECISION"—

Meaning, see **APPEAL 4.**

DEEDS—

See also **BOUNDARIES; ESTOPPEL 2, 4; EVIDENCE 7, 8; HUSBAND AND WIFE 6-9; REFORMATION OF INSTRUMENTS; VENDOR AND PURCHASER.**

1. *Acceptance.—Effect.—Estoppel.*—Where a grantee accepts a deed and takes possession of the real estate, he is bound by the conditions of the deed, since he will not be permitted to accept the beneficial provisions without accepting the burdens, and this rule applies to all estates legal or equitable, including dower.

Ramsey v. Yount, 378, 382 (4).

2. *Application of Description.—Parol Evidence.*—The purpose of a description in a deed is to furnish the means of identifying the lands conveyed and resort may be had to parol evidence to apply the description, render it intelligible and to give the conveyance the practical effect intended by the parties.

Boyd v. Miller, 454, 463 (7).

3. *Construction.—Description.—Boundaries.*—Where a deed specifies a certain number of acres to be taken off of a certain side of a larger tract of land, it will be construed to mean that parallel lines shall fix the boundaries, though they are not mentioned.

Koons v. Burkhart, 30, 35 (7).

4. *Description.—Construction.*—Descriptions in deeds are construed with the utmost liberality, and the intent of the parties, if it can by any possibility be gathered from the language employed, will be effectuated.

Koons v. Burkhart, 30, 34 (3).

DEEDS—Continued.

5. *Description.—Construction.—Parol Evidence.*—Where a deed conveyed all of grantor's land, described as "The east half of the northwest quarter of the southwest quarter of section 34 in township 8 north of range 2 west, containing twenty (20) acres more or less, also sixty (60) acres of the east of the eighty (80) running north and south leaving twenty (20) acres on the west," the description of the sixty acres came within the rule that parol evidence was admissible to apply such description to the subject-matter, so that the conveyance was not void for uncertainty where there was sufficient evidence, in an action to quiet title to such tract, to warrant the trial court in finding that the sixty acres involved was the land intended to be conveyed by the deed. *Koons v. Burkhardt*, 30, 35 (8).
6. *Description.—Construction.*—Where the description in a deed is consistent but incomplete, it is proper to read the deed in the light of surrounding circumstances at the time the deed was made. *Koons v. Burkhardt*, 30, 35 (6).
7. *Time of Delivery.—Presumption.*—Where a document purported to be a duly acknowledged deed, with regular evidence of its execution upon its face, is found in the hands of the grantee, or found upon the proper records, a presumption arises that it was delivered at the time of its date, or at some time prior to the date of its recording, which presumption is sufficient to make out a *prima facie* case of delivery. *Koons v. Burkhardt*, 30, 34 (2).
8. *Validity.—Delivery.*—A deed, otherwise properly executed, is ineffectual to convey title until it has been either actually or constructively delivered. *Koons v. Burkhardt*, 30, 33 (1).

DEFAULT—

Motion to set aside, see **APPEAL** 5, 16.

DELINQUENTS—

Juvenile, see **INFANTS**.

DEMURRER—

See **PLEADING**.

Ruling on, review, see **APPEAL** 30, 33, 60, 64-66, 68, 71, 72, 115, 122;
NEW TRIAL.

DESCRIPTION—

Application, parol evidence, see **DEEDS** 2, 3, 4; **EVIDENCE** 7.

Sale of goods by description, merchantability, warranty, see **SALES** 16.

DISCRETION—

Of trial court, see **APPEAL** 79; **WITNESSES** 2.

DISEASE—

Pre-existing, effect as to compensation, see **MASTER AND SERVANT** 42, 43, 54, 61-63.

DISMISSAL—

See **APPEAL** 17, 45.

DIVORCE—

See also **APPEAL 7.**

EARNINGS—

Of child, right of parent, see **PARENT AND CHILD 2.**

EASEMENTS—

See also **ESTOPPEL 1; STREET RAILROADS.**

1. *Acquired by Grant.—Abandonment.—Evidence.—Acceptance of Other Way.*—Where defendants' grantees were given an easement of way which they never used, but accepted and used a more convenient one subsequently furnished by defendants, the grantees' acceptance of the new way was not as a matter of law an abandonment of the granted easement, but could be considered as an element on the issue of the intention to abandon such easement.
Perry v. Carey, 56, 60 (4).
2. *Acquired by Grant.—Nonuser.—Effect.*—While an easement acquired by actual grant cannot be lost by mere nonuser, a cesser of the use, accompanied by acts clearly indicating an intent to abandon the right, will have the effect of an express release and work an extinguishment of the easement.
Perry v. Carey, 56, 60 (3).
3. *Acquired by Grant.—Abandonment.—Intention.*—An easement of a way resting in a grant may be abandoned by the dominant owner, but the question of abandonment is one of intention which must be determined from the facts of each particular case.
Perry v. Carey, 56, 60 (2).
4. *Additional Burdens.—Rights of Owner.—Additional Servitudes.—Acquiescence.—Estoppel.*—Though the rule is that the owner of a dominant estate cannot subject the servient estate to additional burdens, such rule does not apply where the owner of the dominant estate professes to do so and afterwards becomes the owner of the servient estate, since under such circumstances the doctrine of estoppel by deed applies.
Chamberlin v. Myers, 342, 350 (3).
5. *Quieting Title.—Burden of Proof.*—In a suit to quiet title to the use of an easement over land, it is necessary for the plaintiff to show only a license, the payment of a consideration, or the expenditure of money in reliance thereon, to establish a *prima facie* case; the burden is on the defendant to show an effective revocation.
Chamberlin v. Myers, 342, 351 (5).
6. *Rights of Owner.—Injunction.—Evidence.—Status Quo.*—In an injunction suit to prevent obstruction of an easement over another's lands, evidence tending to show that the defendant, the owner of the original right of way, had given the plaintiffs the right to the use thereof in consideration that the way be doubled in width by extending it an equal distance into their lands, that the plaintiffs had carried out the agreement and had constructed fences and gates, pursuant thereto, that if the defendant were permitted to close up the part of the way on his lands, as he would do if not enjoined, the remaining way would be so narrow that ordinary vehicles could not pass or turn from the way through the gates into their lands, was sufficient to show that the closing up of such part of the way would not leave the plaintiffs in *statu quo*.
Chamberlain v. Myers, 342, 353 (7).
7. *Rights of Owner.—Injunction.*—Where the plaintiffs, under an agreement with the defendant owner of a right of way, had

EASEMENTS—Continued.

acquired the right to the use of the way in consideration that it be widened by extending it an equal distance into the plaintiff's lands, injunctive relief was properly granted to prevent the defendant from closing the part of the way on his land, a legal remedy in damages not being as practicable, efficient and adequate.

Chamberlin v. Myers, 342, 352 (6).

EMANCIPATION—

Of child, see PARENT AND CHILD 1.

EMPLOYES—

See MASTER AND SERVANT.

EMPLOYERS' LIABILITY—

See MASTER AND SERVANT.

ESTOPPEL—

See also APPEAL 7; DEEDS 1; EASEMENTS 4; INSURANCE 15; LICENSES 2; MECHANICS' LIENS 3.

1. *Easements.—Additional Servitudes.—Acquiescence.*—Where an owner of a right of way, by parol agreement, professed to confer on an adjoining owner the right to the use thereof on consideration that the way should be doubled in width by extending it an equal distance into the adjoining owner's land, and the latter, pursuant to the agreement and with the other party's knowledge, made valuable improvements in reliance thereon by the erection of fences and gates, the owner of the former right of way, after purchasing the servient estate, may not assert his after-acquired title to the damage of the adjoining owner and in derogation of the rights assumed to be conveyed by the agreement.

Chamberlin v. Myers, 342, 351 (4).

2. *By Deed.—Reference to Plats.—Effect.*—In an action involving a boundary line, where it appeared that plaintiff, the owner of two adjoining lots, conveyed one to defendants according to a certain original plat, and defendants denied an agreed boundary, but claimed under the deed, such plat became a part of the description in the deed and was binding on defendant, although later surveys shortened the block.

Boyd v. Miller, 454, 464 (8).

3. *Pleading.—Demurrer.—Raising Defense.*—Since an estoppel must be specially pleaded, the question of its existence may not be raised by demurrer to the complaint.

Buckingham v. Kerr, Treas., 290, 300 (10).

4. *Quitclaim Deed.*—Though the general rule is that a quitclaim deed does not estop the grantor from ascertaining an after-acquired interest in the lands therein described, a recital in a deed without covenants, in substance, that the grantor thereby intends to convey an interest specifically described and identified may be effective, through the principle of estoppel, to convey an after-acquired interest.

Buckel v. Auer, 320, 325 (2).

5. *Quitclaim Deed of Husband.—Interest Conveyed.*—A quitclaim deed executed by a husband alone which failed to point out specifically the estate or interest intended to be conveyed was not effective to convey, as an after-acquired interest, the estate acquired in his wife's realty upon her death.

Buckel v. Auer, 320, 326 (3).

EVIDENCE—

Burden of proof, see **APPEAL** 112, 113; **BILLS AND NOTES** 1, 4; **EASEMENTS** 5; **MASTER AND SERVANT** 2, 24; **PARTNERSHIP**; **RAILROADS** 2. Circumstantial, when permissible, see **RAILROADS** 13, 26.

Inferences from evidence, see also **MASTER AND SERVANT** 33; **PRINCIPAL AND AGENT** 3, 5; **RAILROADS** 15.

Newly-discovered evidence, see **NEW TRIAL** 4.

Parol evidence, see also **BILLS AND NOTES** 5; **BOUNDARIES** 3; **CONTRACTS**; **DEEDS** 2, 5.

Presumptions, see also **ACCOUNT STATED**; **COMPROMISE AND SETTLEMENT**; **DEEDS** 7; **RAILROADS** 7, 10.

Prima facie evidence, see **ACCOUNT STATED** 1; **DEEDS** 7; **EASEMENTS** 5.

Review, see **APPEAL** 8, 10, 11, 38, 78, 79, 80-94, 97, 100, 102, 108, 111, 121.

1. *Failure to Produce Favorable Witness.—Presumption.*—Where a person has it within his power to produce a witness, presumably favorably disposed toward him, to explain a transaction, and fails to do so, the presumption is that the testimony, if produced, would be unfavorable to him.

Public Savings Ins. Co., etc. v. Greenwald, 609, 617 (5).

2. *Inference.*—An inference founded on a proved or known fact may be used as the basis for another inference.

Public Savings Ins. Co., etc. v. Greenwald, 609, 624 (12).

3. *Inferences.—Inferences Based on Inferences.*—Although it is not permissible, for the purpose of supporting a proposition, to draw an inference from a deduction which is itself purposely speculative and unsupported by an established fact, since at the beginning of every line of legitimate inferences there must be a fact, known or proved, yet, where there is such a fact, it is the duty of the court to draw thereupon the most reasonable legitimate inferences and an inference so drawn merges itself into the proved fact, which may be a basis for other proper inferences.

Indian Creek Coal, etc., Co. v. Calvert, 474, 495 (7).

4. *Judicial Notice.—Nuisances.—Frame Barn.*—It is a matter of judicial knowledge that a frame barn or similar structure, lawfully and properly erected and maintained on private property in a reasonably safe condition, cannot, in and of itself, be a public nuisance.

Town of Bloomfield v. West, 568, 573 (3).

5. *Opinion.—Health of Insured.—Nonexpert Witness.*—In an action on a life insurance policy, it was proper to permit nonexpert witnesses to give their impressions as to the state of health of insured at the time the policy in suit was issued.

Prudential Ins. Co. v. Diefenbaugh, Admr., 699, 707 (9).

6. *Opinion.—Admissibility.*—In an action against the master for injuries received by a servant who was struck by a small truck, which he and the foreman were using in removing lumber from a dry kiln where plaintiff contended that, because the tracks in the kiln were down grade, the master was negligent in not providing some appliance to check the speed of the trucks when being run down the track, the injured servant was, it appearing that he had been employed at such work for a number of years, competent to testify as to the use and effectiveness of certain appliances to stop the trucks, the matter not being one within the

EVIDENCE—Continued.

- common knowledge or experience of ordinary men of average intelligence. *Showers Bros. Co. v. Davis*, 227, 237 (7).
7. *Parol Evidence.—Description in Deed.*—Where the description given in a deed is consistent but incomplete, and its completion does not require the contradiction or alteration of that given, nor that a new description should be introduced, parol evidence may be received to complete the description and identify the property. *Koons v. Burkhart*, 30, 34 (4).
 8. *Parol Evidence.—Construction of Deeds.*—Extraneous and parol evidence is competent to apply the terms of a deed to the subject-matter. *Koons v. Burkhart*, 30, 35 (5).
 9. *Parol.—Extraneous Circumstances.—Contracts.*—In a proceeding under the Workmen's Compensation Act (Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918), provisions in a contract, upon which depended the question whether the injured applicant was an employe, that the applicant was a subcontractor for construction on the stonework for a government building according to plans prepared by the supervising architect of the treasury department and under his direction, the defendant's only interest being to see that the work was done as planned and to pay the agreed price, was not so ambiguous as to warrant a resort to extraneous circumstances by the Industrial Board. *Mobley v. J. S. Rogers Co.*, 308, 312 (4).
 10. *Records.—Admissibility.—Authentication.—Statutes.*—In view of §§3250, 3251 R. S. 1881 and §§8901-8903 Burns 1914, Acts 1905 p. 383, Acts 1901 p. 348, relating to the adoption, recording and authentication of surveys and plats of cities and towns, a loose paper, claimed to be a town plat, was properly excluded from evidence in an action to quiet title, even though found among the city records, where there was no proof that it had been signed by any one, that it was a duly authorized, executed and recorded plat in accordance with the statutes, or how or by what authority it had been placed with the records of the city. *City of Huntingburg v. Fisher*, 665, 668 (2).

EXCHANGE—

Of property, measure of damages, see FRAUD 5.

EXECUTION—

1. *Executory Contract.—Lien on Proceeds.*—Under §728 Burns 1914, §686 R. S. 1881, giving a lien on the goods and chattels of an execution defendant within the jurisdiction of an officer from the time of the delivery of the execution to him, a judgment creditor, by virtue of its execution in the hands of the sheriff prior to the assignment by the judgment debtor of an executory contract for certain improvement work under which no payment was due, did not acquire a valid and enforceable lien for funds to become due the judgment debtor for work and materials to be thereafter furnished by him under the contract, since there was no existing debt under the contract, which might never be performed so as to make effectual the obligation to pay. *Beckman Supply Co. v. Newell*, 679, 688 (6).
2. *Levy.—Executory Contract.—Statute.*—A debt evidenced by an executory contract for certain improvement work could be reached by the contractor's judgment creditor only under the provisions of §766 Burns 1914, §774 R. S. 1881, providing that

EXECUTION—Continued.

any debt or thing in action, legally or equitably assignable, may be levied upon, when given up by the defendant, and sold on execution, in the same manner as other personal property.

Beckman Supply Co. v. Newell, 679, 690 (7).

3. *Proceedings Supplemental.—Unauthorized Pleadings.*—In a proceeding supplemental to execution, where pleadings other than those authorized by the statute are filed, they may be disregarded.

Beckman Supply Co. v. Newell, 679, 686 (4).

4. *Proceedings Supplemental.—Procedure.*—The rules of civil procedure apply in proceedings supplemental to execution where the statute has not expressly, or by fair implication, indicated the procedure contemplated.

Beckman Supply Co. v. Newell, 679, 685 (2).

5. *Proceedings Supplemental.—Pleadings.*—Under §865 Burns 1914, §822 R. S. 1881, in a proceeding supplemental to execution, formal pleadings are unnecessary, other than the affidavit or verified complaint on which the order to appear is issued and the demurrer and motions authorized by the statute to test the sufficiency of the order and affidavit.

Beckman Supply Co. v. Newell, 679, 684 (1).

6. *Proceedings Supplemental.—Findings and Conclusions.—Right to Require.*—Neither party to a proceeding supplemental to execution has the right to require the trial court to make a special finding of facts and state its conclusions of law thereon under the provisions of the Civil Code; and where a special finding of facts is made in such a proceeding it will be treated as a general finding only.

Beckman Supply Co. v. Newell, 679, 685 (3).

EXECUTORS AND ADMINISTRATORS—

See also **APPEAL** 3, 4, 109; **WILLS**.

1. *Contract to Support Decedent.—Breach.—Recovery by Administrator.—Scope.*—Where decedent conveyed a farm to his daughter for the sole consideration that she would care for and support him and at his decease afford him suitable burial, and she violated the agreement, so that a son was required to support decedent, the administrator of the latter's estate could recover a personal judgment against the daughter for the value of services rendered, and enforce his judgment by means of an equitable lien on the land.

Zoellers v. Lot, Admr., 395, 397 (2).

2. *Administrator's Torts.—Liability of Estate.*—Generally an estate will not be rendered liable for any damages resulting from any false statements, representations, or warranties made by the administrator.

Bright Nat. Bank v. Hanson, 61, 71 (4).

3. *Management of Estate.—Fraud of Administrator.—Liability of Estate.*—Where the court gave an administratrix full and general authority to carry on deceased's business, and in so doing she fraudulently, but within the apparent scope of her powers, obtained certain notes and turned them over to the estate, her fraud was chargeable to the estate.

Bright Nat. Bank v. Hanson, 61, 71 (5).

4. *Petition to Sell Land.—Cross-Complaint to Quiet Title.—Dismissal of Petition.—Effect.*—Where an administrator filed its petition to sell real estate to pay decedent's debts, and defendants brought a cross-action to quiet title to the land involved, the dismissal of plaintiff's petition was in effect an adjudication that plaintiff had no claim against the estate.

Smith v. Linton Trust Co., 691, 693 (1).

EXECUTORY CONTRACTS—

See **EXECUTION** 1, 2.

Validity of assignment, see **ASSIGNMENTS** 2.

EXEMPLARY DAMAGES—

See **FRAUD** 2.

EXHIBITS—

Variance, see **PLEADING** 7.

FAMILY SETTLEMENTS—

See **GIFTS**.

FENCES—

Proof of boundary, parol, see **BOUNDARIES** 3, 5.

Construction, notice to purchaser, see **VENDOR AND PURCHASER**.

FINDINGS—

Review, see **APPEAL** 80-94.

FIRE INSURANCE—

See **INSURANCE** 3-5.

FIRES—

Caused by railroads, damages, action, see **RAILROADS** 20-28.

FORECLOSURE—

See **MORTGAGES**.

FOREMAN—

Order of foreman, injury to servant, effect, see **MASTER AND SERVANT** 17.

Notice of injury, notice to master, see **MASTER AND SERVANT** 58.

FRAUD—

See **BILLS AND NOTES** 1, 2; **CONTRACTS** 3; **EXECUTORS AND ADMINISTRATORS** 3; **GIFTS**; **INSURANCE** 15; **SALES** 17-19; **TRUSTS** 2.

1. *Action.—Fraudulent Concealment.*—Acts constituting fraudulent concealment may precede, be concurrent with, or subsequent to, the accruing of the cause of action.

Van Spanje v. Hostettler, 518, 526 (6).

2. *Action.—Exemplary Damages.*—In an action based on fraud, exemplary or punitive damages in addition to compensatory damages may be recovered.

Moyses v. Robbins, 82, 86 (3).

3. *Fraudulent Representations.—Liability.—Intent.*—Where one assumes to know a material fact and states it as such to induce another to act, he is liable in damages to one acting thereon, and he cannot avoid liability by showing that he did not know such fact or intend the injurious consequences of the statement so made.

Moyses v. Robbins, 82, 88 (6).

4. *Reliance on Representations.—Testimony as to Belief.—Admissibility.*—In an action for fraud, where plaintiff alleged that defendant, an officer of a corporation, caused him to build a house on defendant's property by designedly inducing him to believe that the house was to be constructed for the corporation, testi-

FRAUD—Continued.

mony by plaintiff as to what he understood from defendant's declarations was admissible, since the false belief induced by such declarations was an essential element of the right of recovery.

Van Spanje v. Hostettler, 518, 528 (12).

5. *Sale or Exchange of Property.—Measure of Damages.*—The measure of damages for fraud in the sale or exchange of property is the difference in the actual value of the property received by the defrauded party and its value had it been as represented, so that an instruction in an action for fraud in the exchange of horses, that plaintiff could recover the difference between his horse and the value of the horse received in exchange was erroneous.

Mowes v. Robbins, 82, 85, 86 (1).

GIFTS—

Family Settlements.—Validity.—Family settlements are valid when they are reasonable and the whole transaction has been free from fraud or undue influence.

Ramsey v. Yount, 378, 382 (3).

GOOD FAITH—

Evidence, sufficiency, see **PARTNERSHIP 2**.

GUARDIAN AND WARD—

See **INSANE PERSONS**

HARMLESS ERROR—

See **APPEAL 95-117**.

HAZARDS—

Of employment, defense, effect of Employers' Liability Act, see **MASTER AND SERVANT 9**.

Place of work, effect, see **MASTER AND SERVANT 59**.

HIGHWAYS—

1. *Establishment.—Appeal.—Damages.—Time for Payment.—Order Establishing Highway.—Collateral Attack.—Statute.*—Section 7659 Burns 1914, Acts 1913 p. 11, providing that on appeal from proceedings to establish a highway the proceeding shall be deemed of no effect if the damages are not paid within ninety days, etc., places the same limitations on the circuit court on appeal as are imposed on the board of county commissioners before appeal, and a compliance with the terms of the statute is a condition precedent to the right or authority to enter a final order establishing a highway, and any such order prematurely entered is void and subject to collateral attack. *Weaver v. Ferguson*, 169, 182 (6).
2. *Establishment.—Damages.—Erroneous Award.—Collateral Attack.*—Where, on appeal to the circuit court from an order of the board of county commissioners establishing a highway, the court made an award of damages and ordered the same to be paid out of the county treasury, the power to make such an order being lodged solely in the board of county commissioners under §7655 Burns 1914, Acts 1905 p. 521, the award was erroneous rather than void as to those over whom the court had jurisdiction and they could not attack such judgment collaterally.

Weaver v. Ferguson, 169, 180 (5).

3. *Establishment.—Damages.—Void Judgment.—Collateral Attack.*—Where an appeal was taken to the circuit court from an order

HIGHWAYS—Continued.

of the board of county commissioners establishing a highway and the county was not a party, an award of damages by the court to be paid by the county treasurer was void as to the county, since the court did not have jurisdiction over the person of the county and it could attack the award collaterally.

Weaver v. Ferguson, 169, 180 (4).

4. *Establishment.—Payment of Damages.—Statute.*—Section 7659 Burns 1914, providing that, on appeal from a proceedings to establish a highway, the proceedings shall be deemed vacated and of no effect if damages allowed are not paid within ninety days after the disposition of the appeal, applies, as amended by the act of 1913, Acts 1913 p. 11, to a petition for the opening of a highway filed on the same day that the amended act became effective.

Weaver v. Ferguson, 169, 178 (3).

5. *Establishment.—Void Order.—Right of Appeal.*—The fact that an order of the board of county commissioners establishing a highway was void did not affect the right to appeal therefrom, since an appeal may be taken from a void judgment.

Weaver v. Ferguson, 169, 178 (2).

6. *Establishment.—Compensation.—Authority of Board of Commissioners.—Statutes.*—A final order of a board of county commissioners establishing a highway entered before the damages awarded were paid, deposited, or written consent given, as provided by §7659 Burns 1914, Acts 1913 p. 11, is void.

Weaver v. Ferguson, 169, 178 (1).

7. *Establishment.—Agreement as to Opening and Damages.—Invalidity in Part.—Effect.*—Where, on appeal from an order of the board of county commissioners establishing a highway, the court by agreement of the parties made an order that the road be opened and the part of the order as to payment of damages was void, the agreement, being an entirety, was all void.

Weaver v. Ferguson, 169, 186 (11).

8. *Establishment.—Award of Damages.—Failure to Pay.—Effect.*—Where damages awarded in a highway proceeding had not been paid to a party or deposited to her use and she had not filed her written consent to the opening of the road prior to the entering of the final order establishing the highway, such order was void.

Weaver v. Ferguson, 169, 186 (10).

9. *Establishment.—Agreement as to Damages.—Effect.*—Even though the parties on appeal from an order of the board of county commissioners establishing a highway are bound by an agreement on appeal as to opening and damages, such agreement cannot validate a void order that the damages be paid out of the county treasury, where the county was neither a party to the proceeding nor to the agreement and there was no appropriation of funds to satisfy the claim for damages allowed.

Weaver v. Ferguson, 169, 185 (9).

10. *Establishment.—Appeal.—Damages.—Agreement by Parties.—Validity of Award.*—Where the owner of lands affected by a proposed highway filed no remonstrance or other pleading that might have served as a basis for an allowance of damages in her favor, but she was, on her petition, made a party in the circuit court to an appeal from the board of county commissioners and, by agreement of the parties, she was awarded damages as part of the final order of the court, the absence of a pleading did not invalidate the mere allowance as between the parties.

Weaver v. Ferguson, 169, 185 (8).

HIGHWAYS—Continued.

11. *Enjoining Opening.—Estoppel by Silence.*—Where a landowner had agreed to an order of court opening a highway and fixing the amount of her damages, but she subsequently refused to accept the damages or file a claim based on the damages awarded, she was not estopped from enjoining the establishment of the road for certain illegalities in the proceedings on the ground that she allowed other landowners to remove their line fences and erect others along the line of the proposed highway, where she did nothing of an affirmative nature to mislead the affected landowner, or to show that she intended to abide by an invalid judgment based on the the agreement.

Weaver v. Ferguson, 169, 188 (12).

HUSBAND AND WIFE—

See also **APPEAL 7.**

1. *Agency.*—A husband may act as agent for his wife and bind her by note. *Roper v. Cannel City Oil Co.*, 637, 640 (1).
2. *Agency.—Evidence.*—The relation of agency between husband and wife is governed by the same principles that apply to other agencies. *Roper v. Cannel City Oil Co.*, 637, 640 (3).
3. *Agency.—Evidence.*—Though the existence of the marital relation does not establish the relation of principal and agent between husband and wife, such fact may be considered as a circumstance in determining the question. *Roper v. Cannel City Oil Co.*, 637, 640 (2).
4. *Agency.—Evidence.*—In an action against a married woman on a promissory note, evidence is *held* sufficient to show that the husband had authority to execute the note as agent for the defendant. *Roper v. Cannel City Oil Co.*, 637, 641 (7).
5. *Agency.—Evidence.*—To establish the relation of agency between husband and wife, the evidence must be clear and satisfactory and sufficiently strong to explain and remove the equivocal character in which the wife is placed by reason of the marital relation. *Roper v. Cannel City Oil Co.*, 637, 640 (4).
6. *Conveyances.*—The interest that a wife has in her husband's lands while he is yet living is of such an intangible nature that it cannot be conveyed either by her deed or by the joint deed of herself and husband, the latter retaining his interest in the lands. *Buckel v. Auer*, 320, 326 (5).
7. *Conveyance by Husband and Wife.—Validity.*—A husband may convey lands direct to his wife without the intervention of a third party, and such conveyances are valid in the absence of some legal reason for setting aside. *Ramsey v. Yount*, 378, 381 (2).
8. *Conveyance by Husband and Wife.—Acceptance.—Interest Acquired.*—Although §3029 Burns 1914, §2491 R. S. 1881, provides that a surviving wife shall be entitled to one-third of all the realty owned by the husband during marriage in the conveyance of which she did not join, where a second and subsequent wife accepts a deed of land made to her by her husband in which she did not join, whereby the husband deeded to her a life estate with the remainder to children of a former wife, she acquired only a life estate in all the land, and not the fee in one-third and the life estate in two-thirds. *Ramsey v. Yount*, 378, 384 (7).
9. *Conveyance by Husband and Wife.—Validity.—Statute.—Construction.*—Section 3029 Burns 1914, §2491 R. S. 1881, giving the

HUSBAND AND WIFE—Continued.

wife one-third of all the realty owned by the husband during marriage in the conveyance of which she did not join, does not prevent the husband from conveying lands directly to his wife, the purpose of the statute being to protect her against conveyances to other parties which would defeat her rights as a widow.

Ramsey v. Yount, 378, 383 (6).

10. *Husband's Creditors*.—The husband's inchoate interest in his wife's lands while she is living is so unsubstantial that it may not be reached or affected by his creditors.

Buckel v. Auer, 320, 327 (6).

11. *Rights of Wife in Estate of Deceased Husband*.—*Statutes*.—Under §§3027, 3029 Burns 1914, §§2489, 2491 R. S. 1881, where the husband dies, his widow takes a fee simple absolute in a third of all lands owned by him during the marriage in the conveyance of which she did not join, and this rule applies where the widow is a second or subsequent childless wife and there are children of a previous marriage. *Ramsey v. Yount*, 378, 381 (1).

12. *Separate Estate*.—In view of §3952 Burns 1914, §2921 R. S. 1881, the inchoate interest of the husband in the wife's lands cannot be separately conveyed.

Buckel v. Auer, 320, 327 (7).

13. *Separate Estate*.—The husband's interest in the wife's lands during her lifetime is of the same character as the wife's interest in the husband's lands during his lifetime.

Buckel v. Auer, 320, 326 (4).

INDUSTRIAL BOARD—

See EVIDENCE 9.

Proceedings under Workmen's Compensation Act, see MASTER AND SERVANT 18-65.

INFANTS—

1. *Juvenile Courts*.—*Jurisdiction of Person*.—Where, in a proceeding under §1644 Burns 1914, Acts 1907 p. 59, the parents of a child alleged to be neglected and dependent were served with notice of the proceeding, were present in court, and were given every opportunity to be heard, and made no objection to the sufficiency of the evidence to support the decree removing the child from their custody, they cannot complain that the court assumed jurisdiction over the parties. *Heber v. Drake*, 448, 452, 453 (2).

2. *Juvenile Delinquents*.—*Juvenile Courts*.—*Change of Judge*.—*Statute*.—A proceeding under §1644 Burns 1914, Acts 1907 p. 59, to remove a child from the custody of the parents is a special statutory one, and a change of venue, as is provided for in ordinary cases, is not contemplated therein.

Heber v. Drake, 448, 452 (3).

3. *Juvenile Delinquents*.—*Appeal*.—*Assignments of Error*.—*Sufficiency*.—*Statute*.—Under §1635 Burns 1914, Acts 1907 p. 221, relating to appeals from juvenile courts, the only assignment of error allowed on appeal is "that the decision of the juvenile court is contrary to law," and such assignment is sufficient to present both the sufficiency of the facts found and the sufficiency of the evidence to support the finding. *Heber v. Drake*, 448, 450 (1).

4. *Juvenile Delinquents*.—*Right of Custody*.—*Findings*.—*Sufficiency*.—In a proceeding under §1644 Burns 1914, Acts 1907 p. 59, findings of the juvenile court that the infant made her home with her parents, that the parents refused to allow her to

INFANTS—Continued.

attend school, that she was cursed, abused and ill treated by both parents, was not provided with proper or suitable clothes and was compelled to do farm labor and was threatened and struck by the father, were sufficient to support a judgment awarding her custody to the board of children's guardians.

Heber v. Drake, 448, 453 (4).

5. *Contracts.—Adult Joint Obligor.—Avoidance.—Recovery of Payments.*—An infant is not precluded from recovering payments made upon a piano, after an avoidance of the conditional sale contract under which it was purchased, because an adult was her joint obligor, where all payments were made by or for her.

Story, etc., Piano Co. v. Davy, 150, 154 (2).

6. *Contracts.—Avoidance.—Statu Quo.*—Although an infant, on the disaffirmance of a contract, must return the property acquired thereunder, yet it is not necessary, to make the disaffirmance effective, that he put the other contracting party in *statu quo*.

Story, etc., Piano Co. v. Davy, 150, 160 (6).

7. *Contracts.—Conditional Sale.—Avoidance.—Recovery of Payments.—Return of Property.*—Where an infant bought a piano under a conditional sale contract, and, after the purchase price was paid in part, the piano was retaken by the seller, the contract did not become executed so that the seller could retain the payments, although the contract provided that, if the seller retook the piano in event of the purchaser's default, all money paid on the purchase price should belong to the seller as compensation for the use, rental and depreciation of the instrument.

Story, etc., Piano Co. v. Davy, 150, 157, 161 (5).

INFERENCES—

See EVIDENCE; PLEADING 6.

INJUNCTION—

See ATTORNEY-GENERAL; EASEMENTS 6, 7; HIGHWAYS 11; NAVIGABLE WATERS 2.

Trespass.—Right to Enjoin.—Irreparable Injury.—An action for an injunction cannot be successfully maintained to restrain or prevent the commission of a mere trespass unless it is made to appear that the injury apprehended therefrom will be great or irreparable.

Lake Land Co. v. State, ex rel., 439, 446 (5).

INSANE PERSONS—

1. *Action on Guardian's Bond.—Pleading.—Sufficiency.*—In an action on the bond of a guardian of an insane person, a complaint showing his appointment as guardian, the execution of the bond with condition that the guardian should faithfully administer the trust, the amount of money received, the filing of a final report which failed to account for a part of the money, the discharge of the guardian, and the conversion to his own use of the part unaccounted for, sufficiently alleges a breach of the bond as occurring at the time the report was filed.

Federal Union Surety Co. v. State, ex rel., 337, 340 (2).

2. *Action on Bond.—Sale of Realty.—Liabilities of Sureties on Sale Bond.*—Where the guardian of an insane person had given, in addition to his general bond, a bond for the sale of the ward's realty, and, in the discharge of his trust, he commingled the funds from the sale of the realty with other funds so that they could

INSANE PERSONS—Continued.

not be accurately separated, there could be a recovery either from the sureties on the general bond or from those on the bond to sell the realty.

Federal Union Surety Co. v. State, ex rel., 337, 341 (3).

3. *Guardian's Report.—Suit to Set Aside.—Pleading Breach.*—A complaint to set aside the final report of the guardian of an insane person, on the ground of the breach of a condition in the guardian's bond, need not allege the exact date of the breach, since the failure of the guardian to account in such report for all funds received is, from the time of the filing thereof, a breach of the bond for which the bondsmen are liable.

Federal Union Surety Co. v. State, ex rel., 337, 339 (1).

INSTRUCTIONS—

See TRIAL.

Review, see APPEAL 9, 20-29, 37, 39, 61, 67, 69, 74, 95, 96, 101-107, 111-113, 116, 117, 131, 134.

INSURANCE—

See also EVIDENCE 5.

1. *Contracts.—Construction.*—The rule that it is the duty of the court to ascertain the intention of the parties and to give effect thereto, applies to insurance as well as to other contracts, and the words used will be given their plain, ordinary and popular meaning, unless there is something in the contract to indicate a different meaning.

Mutual Life Ins. Co. v. Guller, Gdn., 544, 549 (1).

2. *Dues and Assessments.—Time of Payment.—Waiver.*—Although a provision in a benefit certificate of insurance limited the time in which dues and assessments might be paid, such provision could be waived by the local agent giving permission to pay them a few days late and thereafter so receiving them for several years.

National Council, etc. v. Sims, 43, 46 (2).

3. *Fire Insurance.—Complaint.—Location of Property.*—Where a complaint on a fire policy to recover for the destruction of farming utensils, buggies, harness, etc., failed to allege that the property, when destroyed or at any other time, was in the barn and sheds designated in the policy, or that such buildings were the usual and accustomed places for keeping the property, or that it had been taken therefrom in its ordinary use and moved temporarily to the place where it was destroyed, but on the contrary expressly alleged that it was the plaintiff's custom to keep the property at the place where it was destroyed, the pleading was insufficient as failing to show that the property was covered by the policy.

Lesh v. Rockcreek, etc., Ins. Co., 301, 307 (4).

4. *Fire Insurance.—Location of Property.*—Where property insured is of such character that its temporary removal or absence from the specified place is necessarily incident to its use and enjoyment, the presumption is, unless precluded by the language, that the parties contemplated such use when the policy was executed.

Lesh v. Rockcreek, etc., Ins. Co., 301, 305 (3).

5. *Fire Insurance.—Personalty Continuously in One Place.*—In policies covering personal property that, from its character and ordinary use, is kept continuously in one place, as merchandise, machinery kept in a building, household furniture, or goods

INSURANCE—Continued.

stored, the location of the property designated in the policy is an essential element of the risk and usually a continuing warranty.

Lesh v. Rockcreek, etc., Ins. Co., 301, 305 (2).

6. *Reinsurance.—Rights of Insured.*—A reinsurance contract authorized by §4753 Burns 1914, Acts 1897 p. 318, §15, relating to the transfer of risks between insurance companies is invalid in so far as it attempts to waive or destroy insured's existing rights.

Federal Life Ins. Co. v. Weedon, Admr., 529, 538 (6).

7. *Life Insurance.—Construction of Policy.—Suicide.*—"By His Own Act."—A provision in a life insurance policy, avoiding it if the assured should die "by his own act," refers to suicide only, and does not include death of a woman from septicemia following an operation to produce a miscarriage.

Mutual Life Ins. Co. v. Guller, Gdn., 544, 549 (2).

8. *Life Insurance.—Death from Illegal Operation.—Insurer's Liability.—Public Policy.*—Where a policy of life insurance, procured and issued in good faith, was payable to beneficiaries, with the right reserved in the insured to change the same, so that they acquired a defeasible vested interest in the policy at the time of its issuance, public policy does not prohibit recovery on the policy by such beneficiaries where insured died from septicemia resulting from a criminal operation, the policy not expressly providing against liability for death from such a cause.

Mutual Life Ins. Co. v. Guller, Gdn., 544, 551 (4).

9. *Life Insurance.—Action on Policy.—Answer.—Sufficiency.*—In an action on a life insurance policy which was reinsured by a successor to the issuing company, an answer alleging that the insured accepted the reinsurance policy, including the terms and conditions of the reinsurance contract between the companies and denying that insured performed its conditions, is defective as being an argumentative denial.

Federal Life Ins. Co. v. Weedon, Admr., 529, 537 (4).

10. *Life Insurance.—Action on Policy.—Complaint.—Failure to Set Out Reinsurance Contract.*—In an action on an insurance policy which was reinsured by another company, the complaint is not defective for failure to allege that the reinsurance contract between the companies was written, or because it was not made part of the complaint.

Federal Life Ins. Co. v. Weedon, Admr., 529, 536 (3).

11. *Life Insurance.—Action on Policy.—Complaint.—Sufficiency.*—In an action on an insurance policy, where the complaint alleged that the insurer refused to accept premiums and annual dues insured consented to the placing of an unlawful lien upon the policy, it was unnecessary to allege or prove an offer to perform.

Federal Life Ins. Co. v. Weedon, Admr., 529, 536 (1).

12. *Life Insurance.—Action on Policy.—Insurer's Refusal to Perform.—Evidence.*—In an action on a life insurance policy, the insurer's letter to insured notifying him of certain liens on the policy, held to warrant the inference that the insurer would refuse to accept premiums, unless insured consented to the placing of such liens on the policy, so that an offer by insured to perform was unnecessary.

Federal Life Ins. Co. v. Weedon, Admr., 529, 541 (9).

13. *Life Insurance.—Action on Policy.—Failure to Make Policy Part of Complaint.—Statute.*—In an action on a policy of life insurance, an averment in the complaint that after insured's

INSURANCE—Continued.

death the insurer procured possession of the policy and refused to deliver it to plaintiff and for that reason it was not set out in the complaint, shows sufficient excuse for failure to comply with §368 Burns 1914, §362 R. S. 1881, requiring that when any pleading is founded on a written instrument or account, the original, or a copy thereof, must be filed with the pleading.

Prudential Ins. Co. v. Diefenbaugh, Admr., 699, 704 (4).

14. *Life Insurance.—Action on Policy.—Evidence.—Copy of Policy.*—In an action on a life policy, where the copy of the policy offered in evidence by plaintiff was admitted by defendant insurer in its affirmative answer to be a true copy of the policy sued on, the admission of the copy in evidence was proper and pertinent as tending to prove the cause of action.

Prudential Ins. Co. v. Diefenbaugh, Admr., 699, 706 (7).

15. *Life Insurance.—Agent's Misrepresentations to Company.—Estoppel.*—Where an applicant for life insurance informed the insurer's agent that she had other insurance, but he misrepresented to the insurer by the answers he wrote into the application that applicant had no other insurance, the insurer is estopped after insured's death from contesting the validity of the policy on the ground that she had falsely represented that she had no other insurance.

Prudential Ins. Co. v. Diefenbaugh, Admr., 699, 708 (12).

16. *Life Insurance.—Misrepresentation in Application.—Effect.*—A false answer in a written application for life insurance made in response to an inquiry concerning other insurance on the life of applicant is a material misrepresentation which will ordinarily avoid the policy.

Prudential Ins. Co. v. Diefenbaugh, Admr., 699, 708 (11).

INTERLOCUTORY ORDER—

Exceptions to administrator's report, see **APPEAL 3**.

INTERROGATORIES—

Answers, effect on general verdict, see **MASTER AND SERVANT 1**; **NEW TRIAL 3**; **TRIAL 8-9**.

JUDGMENT—

Failure to file motion to modify, effect, see **APPEAL 13**.

Judgments appealable, see **APPEAL 2-6**.

Collateral attack, see **HIGHWAYS 1-3**.

Void judgment, right of appeal, see **HIGHWAYS 5**.

JUDICIAL NOTICE—

See **EVIDENCE 4**.

JURISDICTION—

Appellate, see **APPEAL 1**.

Of circuit court on appeal from county commissioners, parties, see **COUNTIES**; **HIGHWAYS**.

Of person, juvenile court, see **INFANTS 1**.

JURY—

Questions for, province, see **TRIAL**.

JUSTICES OF THE PEACE—

1. *Actions Before.—Failure to File Answer.—Defenses.—Statute.*—In an action originating before a justice of the peace, where no formal answer was filed, the defenses were limited to those authorized by §1749 Burns 1914, §1460 R. S. 1881.
Story, etc., Piano Co. v. Davy, 150, 151 (1).
2. *Pleading.—Complaint.—Sufficiency.—Determination.*—In an action originating before a justice of the peace, a complaint sufficient under the rules of pleading and practice governing that court is sufficient in the circuit court on appeal.
Glasser v. Jones, 192, 194 (2).
3. *Pleading.—Complaint.—Sufficiency.*—Where an action is commenced before a justice of the peace, a complaint sufficient in substance to apprise the adverse party of the nature of the demand, and to bar another action for the same thing, is sufficient even as against demurrer. *Glasser v. Jones*, 192, 194 (3).

JUVENILE COURTS—

See INFANTS.

LABORERS—

See MASTER AND SERVANT.

LAKES—

See NAVIGABLE WATERS.

Removal of gravel, enjoining, see ATTORNEY-GENERAL.

LAST CLEAR CHANCE—

Doctrine, application, see RAILROADS 9.

LEVY—

See EXECUTION.

LICENSES—

1. *Use of Land.—Revocation.*—A license to use the land of another executed by the expenditure of money, or given on a consideration paid, is either irrevocable altogether or cannot be revoked without remuneration. *Chamberlin v. Myers*, 342, 349 (2).
2. *Use of Land.—Revocation.*—A parol license to use the lands of another is revocable at the pleasure of the licensor, on the grounds of equitable estoppel, unless the license has been given for a valuable consideration or money has been expended on the faith that it was to be perpetual or continuous.
Chamberlin v. Myers, 342, 349 (1).

LIENS—

See EXECUTION 1; MECHANICS' LIENS; MORTGAGES.

Equitable, enforcement, see EXECUTORS AND ADMINISTRATORS 1.

LIMITATION OF ACTIONS—

1. *Concealment of Liability.—Effect.*—Where an officer of a corporation fraudulently induced a contractor to erect a house on his land in the belief that the house was being constructed for the corporation, the concealment of the fact that the house was not built for the corporation postpones the running of the statute

LIMITATION OF ACTIONS—Continued.

of limitations under §302 Burns 1914, §300 R. S. 1881, providing that where a cause of action is concealed from the knowledge of the person entitled thereto, the action may be commenced at any time within the period of limitation after the discovery of the cause of action. *Van Spanje v. Hostettler*, 518, 524, 526 (5).

2. *Quieting Title.—Possession as Factor.*—A person in possession of real estate may quiet his title against a hostile, unfounded claim asserted at any time within fifteen years; and if out of possession, he may maintain an action to quiet title against any such claim asserted within fifteen years, provided his right to recover possession is not barred by the twenty years' statute of limitation, §295, cl. 6, Burns 1914, §293 R. S. 1881.

Buckel v. Auer, 320, 328 (12).

3. *Quieting Title by Establishing Trust.*—An action to quiet title to lands, by establishing a trust therein, is governed by the fifteen years' statute of limitations. *Buckel v. Auer*, 320, 328 (11).

4. *To Enforce Subsisting Trust.—Repudiation of Trust.—Effect.*—The rule that the statute of limitations may not be pleaded in bar of a suit to enforce a subsisting, recognized and acknowledged trust is qualified by the rule that where the trustee, with knowledge of the *cestui que trust*, openly disavows and repudiates the trust, the statute begins to run. *Buckel v. Auer*, 320, 327 (9).

5. *Trust.—Existence.*—The rule that the statute of limitations may not be pleaded in bar of a suit to enforce a trust where it appears that the trust is direct and continuing, is limited in its application to the trusts that are subsisting, recognized and acknowledged. *Buckel v. Auer*, 320, 327 (8).

LIVE STOCK—

Carriage, delay, damages, see CARRIERS.

Killing, action, proof, see RAILROADS 13, 14.

MASTER AND SERVANT.

- I. MASTER'S DUTY—NEGLIGENCE— II. WORKMEN'S COMPENSATION, 19-65.

See also APPEAL 122; EVIDENCE 6; PLEADING 2.

I. MASTER'S DUTY—NEGLIGENCE—LIABILITY.

1. *Injuries to Servant.—Action.—Verdict.—Answers to Interrogatories.—Evidence.—Sufficiency.*—In an action by a servant against the master for personal injuries, evidence held sufficient to sustain both the general verdict for plaintiff and most of the answers to the interrogatories, so that such answers were not subject to attack on the ground that the jury disregarded the evidence to find facts which would uphold the general verdict.

Showers Bros. Co. v. Davis, 227, 234 (3).

2. *Injuries to Servant.—Action.—Contributory Negligence.—Burden of Proof.—Instructions.*—In an action against a railroad for the death of a servant an instruction that, "if you find that the evidence on the issue of decedent's contributory negligence is evenly balanced or that plaintiffs have a preponderance of the evidence on that question, you should find for the plaintiff as to that proposition," was not objectionable as putting the burden on defendant of proving contributory negligence by its own evidence.

Grand Trunk, etc., R. Co. v. Thrift Trust Co., 198, 216 (7).

MASTER AND SERVANT—Continued.

3. *Injuries to Servant.—Action.—Instructions.—Violations.—Violation of Penal Statutes.*—In a servant's action against the master, a mine operator, for personal injuries, defendant's requested instruction that, if at the time of the injury plaintiff was under the age of fourteen years, he was working in defendant's mine in violation of a penal statute and could not recover, was properly refused, since the fact that a person violating a penal statute when he receives an injury caused by the negligence of another will bar a recovery only when the unlawful act is a contributory cause, and not when it is merely a condition or attendant circumstance.
Vandalia Coal Co. v. Butler, 245, 261 (15).
4. *Injuries to Servant.—Action.—Complaint.—Sufficiency.*—In an action against the master by a servant for personal injuries, the complaint, drawn under the Employers' Liability Act, Acts 1911 p. 145, §8020a *et seq.* Burns 1914, and predicated the action on the negligence of a fellow servant in starting a mine car, crushing plaintiff's hand, held sufficient as against demurrer.
Vandalia Coal Co. v. Butler, 245, 251 (1).
5. *Injuries to Servant.—Action.—Jury Questions.—Negligence and Contributory Negligence.—Statute.*—On an action brought under the Employers' Liability Act of 1911, Acts 1911 p. 145, §8020a *et seq.* Burns 1914, for injuries received by a servant who was struck by a small truck which he and the foreman were operating, the negligence being predicated on the master's failure to furnish proper appliances and the act of the foreman in permitting the truck to run at a dangerous speed, where there was evidence tending to prove that plaintiff was doing the work required of him in the usual and customary way when injured, and that his injury resulted from the negligence of the foreman, who at the time was plaintiff's fellow servant, the question of the master's negligence and plaintiff's contributory negligence was for the jury.
Showers Bros. Co. v. Davis, 227, 235 (4).
6. *Injuries to Servant.—Action.—Instructions.—Contributory Negligence.*—In an action against a railroad for the death of a servant, an instruction that, notwithstanding any negligence of defendant or its agent proximately contributing to decedent's injury, plaintiff could not recover, if decedent, "by the want of ordinary care, and by his own voluntary acts," contributes to the accident, the words "by his voluntary acts" following the word "and" served merely to repeat the thought already expressed in the preceding words, "and" being used in the sense of "that is to say," so that the jury could not have understood from such words that any burden other than proof of decedent's failure to use ordinary care was required of defendant to defeat the action, especially where such instruction, when read in connection with other subsequent instructions and in the light of the evidence, could not have misled the jury to defendant's prejudice.
Grand Trunk, etc., R. Co. v. Thrift Trust Co., 198, 223 (14).
7. *Injuries to Servant.—Assumption of Risk.*—Where one clothed by the master with authority to direct the work and a servant to whom directions are given do not stand upon an equal footing, it cannot be said as a matter of law that the servant is precluded recovery on the grounds that he assumed the risk.
Vandalia R. Co. v. Kendall, 1, 11 (8).
8. *Injuries to Servant.—Assumption of Risk.*—A servant injured while obeying a direct command of the master does not assume

MASTER AND SERVANT—Continued.

the risk, unless the danger is so great and imminent that a reasonably prudent person would not assume it.

Vandalia R. Co. v. Kendall, 1, 9 (6).

9. *Injuries to Servant.—Employers' Liability Act.—Assumption of Risk.*—The Employers' Liability Act, Acts 1911 p. 145, §8020a et seq. Burns 1914, eliminates the defense of hazards inherent or apparent in the employment, and abrogates the assumed-risk rule as to the particular risk of a fellow servant.

Oolitic Stone Mills Co. v. Cain, 646, 651 (2).

10. *Injuries to Servant.—Federal Employers' Liability Act.—Scope of Applicability.*—The Employers' Liability Act, 35 Stat. at L. 65, §8657-8665 U. S. Comp. Stat. 1913, is exclusive within the scope of its operation, and it supersedes all state statutes within its scope and field, so that, where the facts of a particular case fall within its provision, as where a servant's injuries are sustained while engaged in interstate commerce, the federal act alone controls.

Grand Trunk, etc., R. Co. v. Thrift Trust Co., 198, 213 (3).

11. *Injuries to Servant.—Federal Employers' Liability Act.—Assumption of Risk.*—Under the federal Employers' Liability Act, assumption of risk as a defense is removed only in cases where the violation by the common carrier of a statute enacted for the safety of employes contributed to the injury.

Vandalia R. Co. v. Kendall, 1, 8 (5).

12. *Injuries to Servant.—Methods of Work.—Contributory Negligence.*—Where an employe of a quarry was injured by a falling stone which he was assisting in raising, he was not guilty of contributory negligence as a matter of law because he voluntarily chose a hazardous way of doing his work, where he was acting in the usual and customary manner in obedience to, and under the personal supervision of, his superintendent.

Oolitic Stone Mills Co. v. Cain, 646, 652 (4).

13. *Injuries to Servant.—Negligence.—Jury Question.*—Whether a line foreman, in ordering a lineman to board a moving train, was negligent under the circumstances was a question for the jury.

Vandalia R. Co. v. Kendall, 1, 8 (4).

14. *Injuries to Servant.—Negligence.—Duty to Maintain Lookout.—Instructions.*—In an action for the death of a railroad employe caused by a collision between an engine and a flat car on which deceased was standing, an instruction that defendant railway, knowing that men were to board the flat car and be carried out of the yards, was bound, in coupling an engine onto such flat cars, to keep proper lookout and use all reasonable precautions when approaching and coupling to prevent injury to any one on the cars, was not erroneous because telling the jury as a matter of law that it was defendant's duty to keep a lookout where the evidence was such as to justify the single inference that ordinary care required that such lookout be maintained.

Grand Trunk, etc., R. Co. v. Thrift Trust Co., 198, 220 (12).

15. *Injuries to Servant.—Order to Board Train.—Servant's Appreciation of Danger.—Jury Question.*—Whether a servant fully understood and appreciated the danger of obeying an order of the master is ordinarily a question for the jury.

Vandalia R. Co. v. Kendall, 1, 10 (7).

16. *Injuries to Servant.—Order to Board Master's Train.*—In a servant's action under the federal Employers' Liability Act, where

MASTER AND SERVANT—Continued.

the complaint alleged in substance that the plaintiff was employed as a lineman and had the right to ride on the defendant's trains, that his foreman negligently ordered him to board the moving train in order to go to another point on the defendant's road to work, and that in attempting to get on the train his foot slipped and he fell to his injury, it was not necessary to show that the foreman's order was of a formal imperative character.

Vandalia R. Co. v. Kendall, 1, 8 (2).

17. *Injuries to Servant.—Order of Foreman.—Order of Master.*—The order by a line foreman to a lineman to board a moving train in order to go to another part of the line for work was a special order; and the giving of such order was the business of the master.

Vandalia R. Co. v. Kendall, 1, 8 (3).

18. *Injuries to Servant.—Proximate Cause.—Jury Question.*—In a servant's action for injuries sustained in attempting to board a moving train, whether the order of the foreman to board the train was the proximate cause of the injuries was a question for the jury, there being some evidence supporting the verdict on that issue.

Vandalia R. Co. v. Kendall, 1, 11 (9).

II. WORKMEN'S COMPENSATION.

19. *Agreement as to Relation.—Employee and Subcontractors.*—Where a person, under the terms of a contract, was designated a subcontractor for the construction of stonework for a government building, was to furnish his own tools, equipment and laborers, and was to be wholly independent of the general contractor, except that the latter and the architect were to see that proper results were accomplished, the relation created was that of subcontractor and contractor and not that of employer and employee; and this is true, though such person was injured while underdressing a stone according to marks made thereon by the superintendent of the original contractor, the pay for such work being fixed at a certain rate per hour, not as wages, but as the agreed price under the contract. *Mobley v. J. S. Rogers Co.*, 308, 313 (5).

20. *Accident.*—The word "accident," as used in workmen's compensation acts, is employed in its popular sense, and means any unlooked for mishap or untoward event not expected or designed.

Indian Creek Coal, etc., Co. v. Calvert, 474, 482 (5).

21. *"Accident."*—The word "accident" is used in the Workmen's Compensation Act in its popular meaning, which includes any unlooked for mishap or untoward event not expected or designed.

Puritan Bed Spring Co. v. Wolfe, 330, 335 (4).

22. *Award.—Application for Modification.—Scope of Review.*—In a hearing under §45 of the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, for modification of an award because of a change in condition, the parties are bound by the proof made at the former hearing, and proof is limited to evidence tending to prove or disprove the contention that the conditions existing at the time of the award have subsequently changed.

Podlow v. Swartz Electric Co., 400, 405 (5).

23. *Award.—Findings.—Notice of Injury.*—In a proceeding for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, by a coal miner who lost the sight of an eye through injury, but gave no notice to the employer, as required by §22 of the act, a finding by the Industrial Board that defendant's foreman under whom applicant

MASTER AND SERVANT—Continued.

worked had actual knowledge of the accident a few minutes after it occurred, that applicant visited defendant's physician and surgeon, who informed him, after examining the injured eye, that the injury was trivial and required no treatment, and that, relying upon such advice, applicant did not give written notice to defendant, sustained an award of compensation on the ground that the employer's agents and representatives had actual knowledge of the injury at the time it occurred and that a reasonable excuse for failure to give notice existed.

Vandalia Coal Co. v. Holtz, 670, 676 (1).

24. *Award.—Burden of Proof.*—One claiming compensation under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, has the burden of proving that the injuries complained of resulted from an accident arising out of and in the course of the employment.

Newcastle Foundry Co. v. Lysher, 509, 512 (1).

25. *Award.—Conclusiveness.*—An award of compensation under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, not reviewed or set aside, is conclusive on both parties, except as provided in §45 of the act, authorizing a review because of change of condition arising after the making of an award.

Pedlow v. Swartz Electric Co., 400, 405 (4).

26. *Amount of Award.*—Section 31, subd. a, of the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, specifying compensation for the loss by separation of "not more than two phalanges of a finger" applies where only one-eighth of an inch of the first phalange is lost and the injured servant is entitled to the compensation provided therein.

H. K. Toy, etc., Co. v. Richards, 653, 655 (1).

27. *Agreement for Compensation.—Effect.*—Under §57 of the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, an agreement for compensation between an injured servant and the employer which has been approved by the Industrial Board, has the full force and effect of an award.

Pedlow v. Swartz Electric Co., 400, 405 (3).

28. *Agreement as to Compensation.—Modification.—Power of Industrial Board.*—Although the employer and an injured servant entered into an agreement as to compensation for the loss of the employee's finger, as provided for by §57, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, and the agreement was filed with, and approved by the Industrial Board, the award could be modified and increased upon a showing that the employee's use of the hand had become permanently impaired because of infection after the agreed award, where such award was intended to pay only for the loss of the finger.

Enterprise Fence, etc., Co. v. Majors, 575, 579 (3).

29. *Appeal.—Presenting Questions for Review.—Sufficiency of Evidence.*—On an appeal from a finding in a proceedings under the Workmen's Compensation Act, Acts 1915 p. 392, a finding of facts, though evidentiary in character, cannot take the place of the evidence to make effective a challenge of the sufficiency of the evidence.

Raynes v. Staats-Raynes Co., 37, 42 (6).

30. *Appeal.—Burden of Showing Error.*—On an appeal from a finding in a proceedings under the Workmen's Compensation Act, Acts 1915 p. 392, it is the appellant's duty to bring to the court a record which affirmatively shows reversible error, and this

MASTER AND SERVANT—Continued.

requirement is not satisfied by a mere finding containing only evidentiary facts susceptible of two inferences.

Raynes v. Staats-Raynes Co., 37, 41 (4).

31. *Appeal.—Record.—Failure to Include Evidence.*—On an appeal from a finding of the Industrial Board, no question depending upon the evidence for its correct determination can be considered where the evidence is not in the record.

Raynes v. Staats-Raynes Co., 37, 39 (1).

32. *Appeal.—Evidence.—Sufficiency.*—In a proceeding under the Workmen's Compensation Act for injuries sustained by an employe in lifting a bale of wire weighing about 150 pounds, causing a protrusion of an intestine into an existing hernial sac and producing intestinal strangulation, the evidence is reviewed and held sufficient to sustain an award of the Industrial Board.

Puritan Bed Spring Co. v. Wolfe, 330, 335 (5).

33. *Appeal.—Review.—Presumptions.*—In a proceeding for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, it is the province of the Industrial Board to draw legitimate inferences from the facts proved, and on appeal it will be presumed that the board drew those permissible deductions of fact that are in harmony with and support the award.

Bachman v. Waterman, 580, 587 (5).

34. *Appeal.—Sufficiency of Evidence.—Scope of Review.*—On an appeal from an award of compensation under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, the court in determining the sufficiency of the evidence to sustain the award, will consider only the evidence favorable to appellees, together with all favorable inferences deducible therefrom.

Indian Creek Coal, etc., Co. v. Calvert, 474, 479 (1).

35. *Appeal.—Assignment of Error.—Questions Presented.*—Under §8020s2 Burns' Supp. 1918, Acts 1917 p. 154, the assignment of error on appeal that the award is contrary to law presents both the sufficiency of the facts found to sustain the award and the sufficiency of the evidence to sustain the finding of facts.

Pedlow v. Swartz Electric Co., 400, 404 (1).

36. *Appeal.—Findings of Board.—Conclusiveness.*—Where there is some evidence to sustain a finding of the Industrial Board in a proceedings under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, it will not be disturbed on appeal.

Pedlow v. Swartz Electric Co., 400, 404 (2).

37. *Appeal.—Weighting Evidence.—Statutes.*—The amendment of the Workmen's Compensation Act (Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918) by the act of 1917 (Acts 1917 p. 154, §8020q2 *et seq.* Burns' Supp. 1918), which provides that an assignment of error that an award of the full board is contrary to law is sufficient to challenge the sufficiency of the facts found to sustain the award and the sufficiency of the evidence to sustain the finding of facts, does not give the Appellate Court authority to weigh evidence in reviewing an award by the Industrial Board, even where the member of the board who heard the evidence found for appellant, and the award appealed from was made by but two members of the board.

Vonnegut Hardware Co. v. Rose, 385, 388 (1).

38. *Appeal.—Review.—Finding Based on Conflicting Evidence.*—On an appeal from an award of compensation under the Workmen's Compensation Act (Acts 1915 p. 392, §80201 *et seq.* Burns'

MASTER AND SERVANT—Continued.

Supp. 1918), for the death of a servant, where the evidence as to whether an autopsy was necessary to determine the cause of death and whether the demand therefor was made within a reasonable time was conflicting, the finding of the Industrial Board as to the necessity for an autopsy is conclusive on appeal.

Vonnegut Hardware Co. v. Rose, 385, 392 (3).

39. *Appeal.—Review.—Sufficiency of Evidence.*—In a proceedings for compensation under the Workmen's Compensation Act (Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918), for the death of a servant, evidence held sufficient to support the Industrial Board's finding that the strangulation of the intestines which caused decedent's death resulted from hernia, and that the hernia was caused by a strain resulting from the master's work.

Vonnegut Hardware Co. v. Rose, 385, 393 (4).

40. *Appeal.—Review.—Conflicting Evidence.*—In a proceedings for compensation under the Workmen's Compensation Act (Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918), for the death of a servant, where the evidence as to the refusal of decedent and those acting for him to permit an operation, as requested by the employer, was such misconduct as to deprive decedent's dependents of the benefits of the act was conflicting, but was clearly open to more than one inference by reasonable men, the determination of the Industrial Board with reference thereto is conclusive, since the question was one of fact.

Vonnegut Hardware Co. v. Rose, 385, 391 (2).

41. *Construction.—Amount of Award.—Discretion of Industrial Board.*—The court on an appeal from the Industrial Board has no discretion as to the amount of compensation as specified in the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, and it is immaterial that an injury did not seriously impair the employee's working power or that the employee was able to return to work within a short time after the injury.

H. K. Toy, etc., Co. v. Richards, 653 656 (2).

42. *Death Due to Disease.—Right to Compensation.*—The fact that a servant is afflicted with a fatal malady is sufficient to defeat a claim for compensation for his death under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918; only where his decease was in part the result of his ailment progressing naturally and disassociated from any injury that he may have suffered by accident arising out of and in the course of employment, but if such an injury concurs with the ailment in hastening the disease to a fatal termination, the right to an award exists.

Indian Creek Coal, etc., Co. v. Calvert, 474, 480 (3).

43. *Death of Servant.—Award.—Evidence.—Sufficiency.*—In a proceedings under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, for the death of a servant, evidence showing that decedent was afflicted with a disease of the aorta which resulted in the walls thereof becoming weaker and unnaturally thin, that, shortly after deceased had exerted himself extraordinarily in attempting to move a heavy coal car, became ill and died, death resulting from a rupture of the aorta, and that any excitement or exertion might cause a rupture, is sufficient to sustain a finding that the injury was by accident arising out of the employment.

Indian Creek Coal, etc., Co. v. Calvert, 474, 481, 483, 495 (4).

MASTER AND SERVANT—Continued.

44. *Failure to Find.—Effect.*—A finding in a proceeding under the Workmen's Compensation Act, Acts 1915 p. 392, need not affirmatively show a lack of evidence or an inability to find, the failure to find being alone equivalent to a finding against the party on whom the burden of proof rests.
Raynes v. Staats-Raynes Co., 37, 40 (3).
45. *Findings of Industrial Board.—Conclusions.*—In a proceedings under the Workmen's Compensation Act, Acts 1915 p. 392, the inferences drawn from the evidence by the Industrial Board are conclusive on appeal in the absence of the evidence from the record.
Raynes v. Staats-Raynes Co., 37, 42 (5).
46. *Findings of Industrial Board.—Construction of Contracts.*—Where the construction of a contract, upon which depended the relation of master and servant, was a mixed question of law and fact for the determination of the Industrial Board, the conclusion of the board, if supported by some evidence, is binding on appeal.
Mobley v. J. S. Rogers Co., 308, 312 (3).
47. *Findings by Industrial Board.—Conclusiveness.*—In a proceeding for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, the Industrial Board having found facts showing actual knowledge of the injury involved by the employer's agents and representatives, and also reasonable excuse for failure to give statutory notice, such findings are conclusive on appeal, if there is any evidence to sustain either.
Vandalia Coal Co. v. Holtz, 670, 676 (2).
48. *Findings of Fact.—Sufficiency of Evidence.*—In a proceeding for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, evidence held sufficient to sustain findings by the Industrial Board that the employer's agents had knowledge of the injury, and that a reasonable excuse for failure to give statutory notice was shown.
Vandalia Coal Co. v. Holtz, 670, 676 (3).
49. *Legal Conclusions.—Accident Arising Out of Employment.*—The determination of the question whether an accident arose out of the employment within the meaning of the Workmen's Compensation Act, Acts 1915 p. 392, is in the nature of a legal conclusion.
Raynes v. Staats-Raynes Co., 37, 40 (2).
50. *Injury Arising Out of and in Course of Employment.*—An injury is received in the course of the employment when it is suffered while the workman is doing what he was hired to do and it arises out of the employment when it appears that there is a causal connection between the environments of the employment and the resulting injury; and such causal connection is not indicated by the mere fact that a workman's employment required him to be at a certain place at a certain time, but it must also appear that the nature of his employment subjected him at such a place to a certain danger, although not foreseen, and that, by reason of being subjected to such danger, he was injured.
Bachman v. Waterman, 580, 585 (1).
51. *Injury Out of and in Course of Employment.—Evidence.*—Where a flour salesman, whose duty it was to solicit orders and telephone them to his employer from his home at the close of the day's work, was struck by an automobile while crossing a public street in the direction of a street car, which would have carried him to his home, and also toward the business establishment of a prospective customer, the accident occurring shortly before the

MASTER AND SERVANT—Continued.

time he usually arrived at his home, such facts were sufficient to warrant the inference that he was crossing the street either to board the street car to return home in order to telephone the day's orders to the employer's office or to solicit an order from the prospective customer; so that he was engaged in his duties at the time of the accident, and the injury was one arising out of and in the course of the employment.

Bachman v. Waterman, 580, 587, 588 (4).

52. *Injuries to Servant.—Award.—Evidence.—Sufficiency.*—In a proceedings for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, evidence held sufficient to sustain the finding that the injury complained of resulted from an accident arising out of and in the course of the employment.

Newcastle Foundry Co. v. Lysher, 509, 513 (3).

53. *Injury Arising Out of and in Course of Employment.*—In a proceedings for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, the fact that the injury complained of resulted from an accident arising out of and in the course of the employment may be shown by direct proof, or may be proved by facts and circumstances which reasonably authorize the Industrial Board to infer that the injury was so received. *Newcastle Foundry Co. v. Lysher*, 509, 512 (2).

54. *Injury in Course of Employment.*—In a proceeding under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, for compensation for the death of a servant, where it appeared that decedent, a coal miner, died from a ruptured aorta, which was diseased, shortly after extraordinary exertion in attempting to move a heavy coal car, the injury occurred in the course of the employment.

Indian Creek Coal, etc., Co. v. Calvert, 474, 479 (2).

55. *Injury.—Personal.*—A personal injury, as the term is used in the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, refers not to some break in some part of the body or wound thereon, or the like, but rather to the consequence or disability that results therefrom.

Indian Creek Coal, etc., Co. v. Calvert, 474, 495 (6).

56. *Medical and Hospital Expenses.—Liability of Employer.—Statute.*—Under §25 of the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, providing that during the thirty days after an injury the employer shall furnish free of charge to an injured employe an attending physician and such surgical and hospital service and supplies as may be deemed necessary by the physician, or the Industrial Board, where an injured employe was furnished medical attention during the weeks following the accident, but after apparent recovery and several months subsequently to the accident a tumor developed requiring further medical attention, the employer was not liable therefor, since the act limits the liability for medical treatment to a period covered by the first thirty days after the injury and does not require treatment by a physician as the development of an injury may from time to time make necessary, nor does it contemplate full thirty days' treatment intermittent in character and given at such time as the progressive development of an injury may require. (*In re McCaskey* [1917], 65 Ind. App. 349, distinguished.)

John A. Schumaker Co. v. Kendrew, 466, 468, 473 (1).

MASTER AND SERVANT—Continued.

57. *Medical Expenses.—Liability.—Statute.*—When an injury resulting from an accident is such that both the injured employe and employer at the time regard it as one of little or no consequence and as not requiring the attention of a physician and as not of the kind or character contemplated by the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, and later developments show an injury coming within the act, and requiring medical attention the date for computing the thirty days during which medical attention must be furnished under §25 of the act is the date when the injury develops within the meaning of the act, even though the development of such injury is delayed thirty days or more after the happening of the accident which causes it.

John A. Schumaker Co. v. Kendrew, 466, 472 (3).

58. *Notice of Injury.—Knowledge of Foreman.*—Where the employer's foreman or pit boss had knowledge of the injury suffered by claimant for compensation under the Workmen's Compensation Acts, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, at the time disability resulted therefrom, the employer had sufficient notice of the injury under the act.

Vandalia Coal Co. v. Holtz, 670, 678 (4).

59. *Place of Employment.*—Under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, an employe's place of employment is sufficiently comprehensive to include all the territory that he is required to visit in performing the duties of his employment; and where such duties require him to travel public streets, the perils and hazards incident to travel thereon, such as danger from moving vehicles, become a part of the environment in which he is required to work.

Bachman v. Waterman, 580, 585 (2).

60. *Place of Work.—Injury Arising Out of and in Course of Employment.*—Where it was necessary for a salesman to travel the public streets in the performance of his duties, his place of work included such streets as he was required to traverse while doing his work, and an injury received by being struck by an automobile while traversing a public street was an injury by accident arising out of and in the course of his employment, if at the time he was performing the duties of his employment.

Bachman v. Waterman, 580, 586 (3).

61. *Pre-existing Disease.*—Where an employe affected with a disease is injured under such circumstances that the act in question would entitle him to compensation if no disease were involved, and such disease is materially hastened to final culmination by the injury, an award may be had upon a showing that the injury was the result of accident.

Puritan Bed Spring Co. v. Wolfe, 330, 333 (1).

62. *Pre-existing Disease.*—Where an employe receives an accidental injury which in itself would entitle him to compensation, and the injury hastens to final culmination a pre-existing disease, the courts will not undertake to measure the degree of disability due respectively to the accident and to the disease, but the consequence will be attributed solely to the accident.

Puritan Bed Spring Co. v. Wolfe, 330, 333 (2).

63. *Pre-existing Disease.—Strangulated Hernia.—Proximate Cause.*—Where an employe afflicted with hernia lifted a bale of wire weighing about 150 pounds and thereby caused the intestine to

MASTER AND SERVANT—Continued.

protrude into the existing hernial sac, necessitating an operation to save his life, he was entitled to an award under the Workmen's Compensation Act, and the mere fact that his condition made him more susceptible to the injury resulting in his disability would not warrant a holding that the disease, rather than the "accident," was the proximate cause of the injury.

Puritan Bed Spring Co. v. Wolfe, 330, 333 (3).

64. *Refusal to Submit to Operation.—Right to Compensation.*—An injured employe seeking compensation under a workmen's compensation act must submit to an operation which will cure him when so advised by his attending physician, when not attended with danger to life or health or extraordinary suffering, and he cannot recover compensation for permanent impairment resulting from a refusal to submit to such an operation.

Enterprise Fence, etc., Co. v. Majors, 575, 577 (1).

65. *Refusal to Submit to Operation.—Right to Compensation.*—In a proceeding for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, §80201 *et seq.* Burns' Supp. 1918, for injury to a hand, applicant's refusal to permit the amputation of a finger was not such unreasonable or wilful misconduct as would prejudice the allowance of additional compensation, for permanent impairment of the hand, where the attending physician advised that the finger might be saved.

Enterprise Fence, etc., Co. v. Majors, 575, 578 (2).

MATERIALMEN—

See **MECHANICS' LIENS.**

MAYOR—

Power, to remove city engineer, see **MUNICIPAL CORPORATIONS 2.**

MECHANICS' LIENS—

1. *Right to Materialman's Lien.—Use of Materials.*—The mechanic's lien statute rests on the principle that one who furnishes labor or material for the improvement of property is entitled to look to that property for his compensation, and a materialman claiming a lien must ordinarily show that his materials were furnished for and were actually used in the erection, alteration or repair of the building against which the lien is asserted.

Moore, etc., Lumber Co. v. Scheid, 694, 697 (3).

2. *Right to Materialman's Lien.—Use of Materials.*—It is not always necessary for one asserting the right to a materialman's lien to show that the material furnished actually went into the building for which it was furnished, since the circumstances in a particular case, especially where the material was furnished to the owner of a building to be used therein, may estop such owner, in a foreclosure suit, from invoking the general rule.

Moore, etc., Lumber Co. v. Scheid, 694, 698 (4).

3. *Materialman's Lien.—Material Furnished But Not Used.—Estoppel.*—Where the trial court found specially that plaintiff furnished materials directly to an owner of realty on his promise to use it in the construction of his dwelling house and on the security of that building and the realty on which it was being erected, and that the owner diverted the material to other use without the knowledge or consent of plaintiff, the owner was estopped from relying on the general rule that a materialman

MECHANICS' LIENS—Continued.

claiming a lien must ordinarily show that his materials were actually used in the building against which the lien is asserted.

Moore, etc., Lumber Co. v. Scheid, 694, 698 (5).

MEMORANDUM—

Demurrer, statute, scope, see **PLEADING** 10-12.

MERCHANTABILITY—

Implied warranty, see **SALES** 15, 16.

MISCONDUCT—

Of counsel, presenting for review, see **APPEAL** 35.

MORTGAGES—

See also **ASSIGNMENTS**.

School fund, party in interest, see **STATES**.

1. *Absolute Deed.—Option to Repurchase.*—In an action to have an absolute deed declared a mortgage, evidence showing that grantor had an option to repurchase the land conveyed within a certain period is insufficient upon which to declare the deed a mortgage.
Moore v. McClain, 102, 110 (5).
2. *Absolute Deed.—Character of Instrument.—Evidence.—Promise to Pay Debt.*—On ascertaining whether an absolute deed to one discharging indebtedness on the land conveyed is a mortgage, although the absence of a promise to repay the grantee at any specified time is not conclusive, it is a circumstance more favorable to the grantee than to the grantor.
Moore v. McClain, 102, 110 (3).
3. *Action to Have Deed Declared a Mortgage.—Evidence.—Sufficiency.*—In an action to have a deed declared a mortgage and to quiet title, evidence held sufficient to sustain a finding that the instrument was a deed and not a mortgage.
Moore v. McClain, 102, 109, 110 (2).
4. *Conditional Sales.—Enforcement.*—While courts are inclined to regard a transaction as a mortgage rather than a conditional sale, yet when the contract on its face shows a conditional sale and there are no facts explaining or contradicting its terms, it will be carried into execution. *Moore v. McClain*, 102, 110 (4).
5. *Foreclosure.—Agreement to Postpone Action.—Breach.*—Where a mortgagee, pending foreclosure proceedings, made an agreement to postpone the action until the mortgagor paid off certain liens, to take a new mortgage and then to dismiss the action, the mortgagee's refusal to carry out the agreement as to the taking of the new mortgage and the dismissal of the action, after the mortgagor had paid off the liens mentioned in the agreement, was not a proper matter for a plea in abatement in the foreclosure action.
Nelson v. Reidelbach, Exr., 19, 26 (3).

MOTIONS—

See **APPEAL** 13, 16, 78; **NEW TRIAL**.

To make specific, see **PLEADING** 2.

MUNICIPAL CORPORATIONS—

1. *City Engineer.—Payment of Salary.—Approval of Bond.*—The mere failure of an appointee to the office of city civil engineer

MUNICIPAL CORPORATIONS—Continued.

to have his bond approved by the common council, as required by §8695 Burns 1914, Acts 1905 p. 219, §92, is not a sufficient reason for refusing to pay his salary, especially where the only objection is from one previously holding the office, who had been removed and showed no right to the office.

Douglass v. Rights, 111, 118 (2).

2. *City Engineer.—Term of Office.—Removal.—Power of Mayor.*—As the term of office of the city civil engineer is not declared by the Constitution or statute, he, under Art. 15, §2, of the Constitution of Indiana, holds office during the pleasure of the mayor, by whom, under §§8695, 8682 Burns 1914, Acts 1905 p. 219, §92, 80, he is appointed and may be removed.

Douglass v. Rights, 111, 118 (1).

3. *Contracts.—Appropriations.—Statutes.*—Section 8687 Burns 1914, Acts 1905 p. 219, §85, providing that all contracts and agreements, express or implied, and all obligations of any and every sort beyond existing appropriations shall be void, applies to cities of the fifth class, such limitation on the power to contract not being restricted to executive departments, but applies to all contracts made in behalf of any city by whatever authority.

Brayton v. City of Rushville, 238, 243 (7).

4. *Contracts.—Appropriations.—Statutes.*—Under §8639 *et seq.* Burns 1914, Acts 1905 p. 219, which divides all cities into five classes, cities of the fifth class are restricted in making contracts by the provisions regarding appropriations in the same manner as cities of other classes.

Brayton v. City of Rushville, 238, 242 (5).

5. *Parks.—River in Park.—Liability for Dangerous Condition.*—In an action against a city for the death of plaintiff's minor daughter, where the complaint alleged that, while boating at defendant's invitation on a stream contiguous to a public park, a small boat in which deceased was riding was overturned in a collision with a privately owned motorboat, and, after being thrown in the water, she was caught and held by a barbed wire in the stream and drowned, the negligence charged being that defendant carelessly permitted quantities of barbed wire to accumulate in the river bed and that it allowed the use of motorboats on the river, thereby endangering boaters and bathers, where there was no evidence to sustain the charge of negligence as to the use of motorboats or that the city had notice, actual or constructive, of the existence of the wire, and the evidence further showed that defendant exercised no control over the place where the accident occurred, except to police the stream, and the wire could not have been seen by the exercise of ordinary care by one doing police duty, a verdict for defendant is sustained by sufficient evidence.

Gibson v. City of Indianapolis, 89, 90, 92 (1).

6. *Statute.—Street Improvements.—Construction.*—In ascertaining the legislative intent in enacting §8710 *et seq.* Burns 1914, Acts 1905 p. 236, as amended, Acts 1909 p. 412, relative to assessments for street improvements, etc., the court must consider the question in the light of the rule requiring such statutes to be strictly construed.

Buckingham v. Kerr, Treas., 290, 294 (1).

7. *Nuisance.—Wrongful Use of Property.—Abatement.—Powers of City.*—If a nuisance arises out of the improper use of a building and is not inherent in the structure, the municipal corporation may regulate the use, but it cannot order a destruction of the

MUNICIPAL CORPORATIONS—Continued.

building; and, if the offense is inherent in the structure, a demolition thereof may not be resorted to, if, prior to the exercise of municipal authority, the objectionable features have been eliminated.

Town of Bloomfield v. West, 568, 574 (5).

8. *Nuisances.—Powers of City.*—A municipal corporation, although empowered by law to declare what shall constitute a nuisance, may not declare that to be one which in part is not.

Town of Bloomfield v. West, 568, 573 (2).

9. *Public Nuisances.—Wrongful Use of Property.—Abatement.—Powers of City.*—The use or condition of a frame barn or similar structure may become objectionable, so that action may be taken by a municipal corporation to abate or remove the nuisance thus created, but such power must not be exercised to a degree greater than is necessary to preserve the public interest.

Town of Bloomfield v. West, 568, 573 (4).

10. *Street Improvements.—Power of Common Council.—Nature of.*—Though the action of the common council in levying street improvement assessments bears some resemblance to judicial action, the council is not even an inferior court, and therefore cannot exercise judicial power; the only instance in which the council acts independently or quasi-judicially is in carrying back portions of the primary assessment from abutting property to adjacent tracts, all other powers in levying assessments being purely ministerial.

Buckingham v. Kerr, Treas., 290, 297, 298 (8).

11. *Street Improvements.—Assessments.—Property Liable.*—In carrying back from abutting property to adjacent tracts portions of the primary assessment for street improvements, under §8714 Burns 1914, Acts 1909 p. 412, no intervening tract may be ignored, but the several tracts must be assessed consecutively; in this manner portions of the primary assessment may be carried back 150 feet, though no assessment can extend across another street, even if owned by the same person and within 150 feet.

Buckingham v. Kerr, Treas., 290, 295 (7).

12. *Street Improvements.—Assessments.—Injunction.—Collateral Attack.*—Where the common council levied an assessment for street improvements on property that did not abut on the street and was not adjacent to abutting property, but was separated therefrom by another public thoroughfare, though it belonged to parties owning the abutting property, the action was void; and it was not necessary for the owners to appear in the proceeding to protect their rights or to seek relief by appeal to the circuit court, but they could bring a separate action to enjoin the illegal assessment, since the only question reviewable on appeal to the circuit court is the amount of the assessment, the right of appeal being expressly denied as to an assessment on property not liable.

Buckingham v. Kerr, Treas., 290, 299, 300 (9).

13. *Street Improvements.—Assessments.—Apportionment.*—The plan provided in §8714 Burns 1914, Acts 1909 p. 412, for carrying back a portion of the primary assessment for street improvements from property abutting the street and distributing it on successive tracts in the rear, constitutes the only method by which such adjacent tracts may be assessed, whether there be diverse ownership or not.

Buckingham v. Kerr, Treas., 290, 295 (6).

14. *Street Improvements.—Assessments.—Apportionment as Between Adjacent Owners.*—Though special assessments for street improvements are levied primarily on the property adjoining the

MUNICIPAL CORPORATIONS—Continued.

street, the common council may, after a hearing under §8714 Burns 1914, Acts 1909 p. 412, relieve an owner of such adjoining property from an inequitable assessment by transferring a portion of the primary assessment to adjacent property lying back of that adjoining the street and within the assessment district; and in such case the element of diverse ownership may not be ignored, since a levy of the entire assessment on the two tracts without an apportionment of a specific share to each might result in irremediable injustice.

Buckingham v. Kerr, Treas., 290, 295 (5).

15. *Street Improvements.—Excessive Assessments.—Remedy.*—Though a lot is of such little depth that its portion of the primary assessment for street improvements exceeds its value, the entire portion of such assessment must be levied upon it; but a readjustment to avoid confiscation may be made after a hearing under §8714 Burns 1914, Acts 1909 p. 412.

Buckingham v. Kerr, Treas., 290, 295 (4).

16. *Street Improvements.—Assessments.—Property Affected.—Statute.*—The provision in §8714 Burns 1914, Acts 1909 p. 412, that property abutting on a street to be improved shall be primarily assessed without regard to depth is not intended to extend the limits of the special tax district beyond 150 feet from the line of the street as provided by §8716 Burns 1914, Acts 1909 p. 412.

Buckingham v. Kerr, Treas., 290, 294 (3).

17. *Street Improvements.—Assessments.*—The process prescribed by §8716 Burns 1914, Acts 1909 p. 412, for determining what property is "liable to be assessed" for proposed street improvements is essentially one of taxation.

Buckingham v. Kerr, Treas., 290, 294 (2).

NAVIGABLE WATERS—

1. *Lands Under Water.—Grants.—Powers of State.*—The state in its sovereign capacity is without power to convey or curtail the rights of its people in lands under Lake Michigan within the boundaries of the state.

Lake Land Co. v. State, ex rel., 439, 446 (3).

2. *Lands Under Water.—Removal.—Right to Enjoin.—"Purpresture."*—In an action by the state to enjoin the removal of sand and gravel from the bed of Lake Michigan within its borders, the complaint is not aided by the doctrine of purpresture, since a purpresture signifies an encroachment to the exclusion of others, or a permanent obstruction, whereas the trespass alleged was a temporary use by anchoring vessels for dredging.

Lake Land Co. v. State, ex rel., 439, 447 (6).

3. *Lands Under Water.—Right to Use.—Rights of Citizens of Other States.*—The right of a state in and under the waters of Lake Michigan within the state is a holding in trust for the people of the state as a whole, and they may use such lands so long as they do not interfere with their use by other citizens, but that privilege does not extend to citizens of another state or to foreign corporations.

Lake Land Co. v. State, ex rel., 439, 443 (2).

4. *Removal of Land Under Water.—Action by State to Enjoin.—Complaint.—Sufficiency.*—In an action by the state on the relation of its Attorney-General to enjoin the removal by a foreign corporation of sand from the bed of Lake Michigan within the

NAVIGABLE WATERS—Continued.

boundaries of the state, the complaint, although not alleging that any damage would result to plaintiff by the removal of the sand, but averring that the deposits of sand and gravel being removed were valuable in the market and stating the fair market value thereof, *held* sufficient to state a cause of action.

Lake Land Co. v. State, ex rel., 439, 446, 447 (4).

NEGLIGENCE—

See also **APPEAL 103; CARRIERS; MASTER AND SERVANT; RAILROADS.**

Contributory, see also **MASTER AND SERVANT 2, 5, 6, 12; PLEADING 13; RAILROADS 4-8.**

1. **Contributory Negligence.—Pleading.**—In a complaint to recover damages for a personal injury caused by negligence, it is not necessary to allege the plaintiff's freedom from contributory fault, in view of §362 Burns 1914, Acts 1899 p. 58.

Chicago, etc., R. Co. v. Barnes, 354, 357 (2).

2. **Contributory Negligence.—Children.—Instruction.**—A child of tender years, who was injured in a railroad crossing accident, was not required to exercise the degree of care incumbent on an adult; hence, instructions on the degree of care required were not erroneous as requiring the conduct of such child to be measured by the standard of a child rather than that of an adult.

Chicago, etc., R. Co. v. Barnes, 354, 363, 365, 366 (8).

3. **Contributory Negligence.—Children.**—In an action against a railroad company for damages sustained by a ten year old child in a railroad crossing accident, where there was no contention that the child was *non sui juris*, the rule is that such child was capable of contributory negligence and was required to use such reasonable care for her own safety as ought ordinarily to be expected from children of like age, knowledge, judgment, discretion and experience, under the same or similar circumstances.

Chicago, etc., R. Co. v. Barnes, 354, 363 (7).

4. **Damage to Personal Property.—Action.—Pleading.—Negating Contributory Negligence.**—In an action to recover damages for injury to personal property, the complaint must negative contributory negligence.

Chicago, etc., R. Co. v. Van Stone, 47, 50 (1).

5. **Damage to Personal Property.—Negligence of Agent.**—In an action for damages to plaintiff's automobile sustained in a collision on a railroad crossing while the machine was being driven by plaintiff's agent, the negligence of the driver, if any, was the negligence of plaintiff.

Chicago, etc., R. Co. v. Van Stone, 47, 50 (2).

NEWLY-DISCOVERED EVIDENCE—

See **NEW TRIAL 4.**

NEW TRIAL—

See also **APPEAL 36, 40, 89, 130.**

1. **Grounds.—Ruling on Demurrer.**—Overruling a demurrer to a complaint is not a cause for a new trial.

Glasser v. Jones, 192, 195 (4).

2. **Grounds.**—Specifications in a motion for a new trial that the finding and judgment of the court is contrary to law, is not sus-

NEW TRIAL—Continued.

tained by sufficient evidence, is contrary to the weight of the evidence, and is contrary to law and the evidence, are not grounds for a new trial authorized by statute.

Wright, Rec., v. Cohn, 589, 592 (2).

3. *Grounds.—Answers to Interrogatories.—Evidence.*—Though a fact found by an answer to an interrogatory is not sustained by the evidence, a new trial is not warranted on that ground unless the fact is one which is essential to the general verdict; but where answers to interrogatories indicate that the jury wholly disregarded the testimony so as to make out a case in favor of one party, a new trial should be granted.

Showers Bros. Co. v. Davis, 227, 232 (2).

4. *Grounds.—Newly-Discovered Evidence.—Diligence.—Showing.*—In an action to quiet title, a new trial on the ground of newly-discovered evidence, consisting of a deed, will not be granted, where the showing made indicates that the deed was found of record in the county recorder's office, where it had been for many years and no facts are alleged to show any effort to obtain such evidence before trial, though defendant was in possession of such information as would put it on inquiry.

City of Huntingburg v. Fisher, 665, 669 (3).

5. *New Trial as of Right.—Time for Motion.—Premature Motion.*—Where, in an action to quiet title, plaintiff's motion for a new trial as of right was filed prior to rendition of judgment on the verdict, it was not error for the trial court to permit him to withdraw such motion and to refile it at the proper time.

Gray v. Blankenbaker, 558, 561 (3).

NONUSER—

Effect, see EASEMENTS 2.

NOTICE—

Of appeal, see APPEAL 14.

NUISANCE—

See also EVIDENCE 4; MUNICIPAL CORPORATIONS 7-9.

OBJECTIONS—

Presenting questions for review, reservation of grounds, see APPEAL 8-13.

OPINIONS—

See EVIDENCE 5, 6.

PARENT AND CHILD—

1. *Emancipation.—Evidence.*—Where a father allowed an infant daughter to use and apply her earnings to the purchase of a piano, and, after she had avoided the purchase contract, prosecuted an action as next friend to recover payments made, such facts are evidence of her emancipation, which need not be proved by direct evidence, but may be implied from circumstances.

Story, etc., Piano Co. v. Davy, 150, 157 (3).

2. *Child's Earnings.—Right of Parent.—Money Paid to a Third Person.*—Although a parent is generally entitled to the services and earnings of his minor child and may recover the value thereof

PARENT AND CHILD—Continued.

from the person for whom the services were rendered, he cannot recover for himself the earnings which he has permitted the child to collect and pay to a third person.

Story, etc., Plano Co. v. Davy, 150, 157 (4).

PARKS—

Dangerous condition, liability of city, see **MUNICIPAL CORPORATIONS** 5.

PAROL EVIDENCE—

See **EVIDENCE**.

PARTIES—

See **HIGHWAYS** 3, 9.

School fund mortgage, party in interest, see **STATES**.

Defects.—Waiver.—The question as to a defect of parties was waived where the appellant failed to present his objection to the trial court. *Bollenbacher v. Foley*, 632, 636 (2).

PARTNERSHIP—

1. *Breach of Trust.—Action.—Burden of Proof.*—In an action by a partner to recover damages for an alleged breach of a partnership contract, the burden is on the plaintiff to show both the partnership and its breach. *Barley v. Sansberry*, 132, 148 (3).

2. *Breach of Contract.—Action.—Evidence.—Sufficiency.—Good Faith.*—In an action by one partner against another to recover damages for an alleged breach of a partnership contract providing for the purchase from a trustee in bankruptcy of an automobile factory and that certain payments be made to plaintiff if an option for the repurchase of the plant by its former owner was exercised, evidence *held* to show that dependent partner, in selling under the option on time instead of for cash, acted in good faith and that plaintiff was tendered all that was due him under the contract, so that the evidence was sufficient to sustain the trial court's finding for defendant.

Barley v. Sansberry, 132, 147, 149 (2).

PEREMPTORY INSTRUCTION—

See **TRIAL** 9, 10.

Making part of record, see **APPEAL** 24, 28.

PERSONAL INJURIES—

See **DAMAGES** 2, 3; **MASTER AND SERVANT** 1-18; **RAILROADS**; **TRIAL** 6, 7.

PLATS—

Authentication, admissibility, see **EVIDENCE** 10.

Description, pleading, effect, see **BOUNDARIES** 4.

Reference to, effect, see **ESTOPPEL** 2.

PLEADING—

In actions before justices of the peace, see **JUSTICES OF THE PEACE**.

1. *Complaint.—Theory.*—A complaint must proceed upon some defi-

PLEADING—Continued.

nite theory, which must be determined from its general scope and tenor. *Taylor v. Capp*, 593, 605 (14).

2. *Complaint.—Motion to Make Specific.*—In an action for personal injuries, where the complaint stated facts sufficient to constitute a cause of action under the Employers' Liability Act, Acts 1911 p. 145, §8020a *et seq.* Burns 1914, on the theory that plaintiff was injured through the negligence of a fellow servant, the overruling of a motion made under the act of 1915, Acts 1915 p. 123, §343a Burns' Supp. 1918, to require plaintiff to state facts to sustain allegations denominated as conclusions, which were not necessary to state a cause of action, is not reversible error.

Vandalla Coal Co. v. Butler, 245, 252 (2).

3. *Complaint.—Demurrer.—Overruling.—Effect.*—In an action for a personal judgment and to have declared and enforced a vendor's lien, a demurrer was properly overruled, even though allegations seeking to establish the lien may have been insufficient, where the complaint disclosed that plaintiff was entitled to personal judgment.

Zoellers v. Lot, Admr., 395, 397 (1).

4. *Complaint.—Stating Alternative Cause of Action.*—In an action on a life policy by insured's son in his individual capacity and as executor, an allegation in a paragraph of complaint that the son "and the executor and administrator of said estate were named as beneficiaries" is not subject to the objection that it attempts to state an alternative cause of action.

Prudential Ins. Co. v. Diefenbaugh, Admr., 699, 703 (3).

5. *Complaint.—Sufficiency as to Coplaintiffs.*—A complaint which does not state a good cause of action as to all, though it does as to some, of the plaintiffs is bad as to all for want of sufficient facts to constitute a cause of action.

Prudential Ins. Co. v. Diefenbaugh, Admr., 699, 702 (1).

6. *Construction.—Inferences.*—A fact reasonably inferable from facts directly averred will be given the same force as if directly stated.

Taylor v. Capp, 593, 604, 605 (12).

7. *Exhibits.—Variance.*—A fire insurance policy filed as an exhibit to a complaint will control, as to property insured, if there is any variance between its provisions and the allegations of the pleading.

Lesh v. Rockcreek, etc., Ins. Co., 301, 304 (1).

8. *Demurrer.—Form.—Sufficiency.*—A demurrer is sufficient in form and substance where it is in the statutory language and the memorandum points out specifically the defects in the paragraph to which it is addressed.

Hammerton v. J. R. Watkins Medical Co., 515, 517 (1).

9. *Demurrer.—Grounds.*—A variance between the allegations of the complaint and the instrument on which the action is founded is not a ground for demurrer, since the instrument controls, and such allegations will be disregarded. *Taylor v. Capp*, 593, 599 (1).

10. *Demurrer.—Memorandum.—Statute.—Scope.*—Where an action was commenced prior to the act of 1911, Acts 1911 p. 415, §344 Burns 1914, requiring a memorandum to be filed with a demurrer for insufficiency of facts, but excepting pending litigation, and was reversed on appeal and remanded to the court below subsequently to the enactment of such statute, the plaintiff's demurrers to paragraphs of answer came within the exception contained in the act and it was not necessary that they be accompanied by memoranda even though the original pleadings were

PLEADING—Continued.

amended and additional pleadings filed, where such pleadings did not in any manner change the nature and character of the original action.

Board, etc. v. Riggs, 263, 266 (1).

11. *Demurrer.—Memorandum.—Waiver of Objections.*—Section 344 Burns 1914, Acts 1911 p. 415, providing that defects in pleadings not specified in the memorandum accompanying the demurrer are waived, does not require a demurring party to print out in his memorandum every objection to a pleading which might be valid under any appealable theory upon which the pleading might be predicated, but only such infirmities as are necessary to make the pleading sufficient on the theory on which it is drawn, and it is only such defects that are waived under the statute by a failure to specify them in the memorandum; nor does the statute require the demurring party to suggest omissions or averments which might make such pleading sufficient upon some theory different from that on which it proceeds.

Grand Trunk, etc., R. Co. v. Thrift Trust Co., 198, 206 (1).

12. *Demurrer to Complaint.—Scope of Review.*—In an action on a life insurance policy by insured's son in his individual capacity and as administrator, where the first paragraphs of complaint alleged that the son in his personal capacity was the sole beneficiary, and the second averred that both plaintiffs were cobeneficiaries, and entitled to maintain a joint action, a demurrer to the second paragraph required a consideration of it alone, and, such paragraph being sufficient, the allegation of the first paragraph did not, as to the demurrer, render the complaint insufficient as not stating a cause of action as to all plaintiffs.

Prudential Ins. Co. v. Diefenbaugh, Admr., 699, 703 (2).

13. *Contributory Negligence.—Questions of Fact.*—In actions for personal injuries caused by negligence, the court may not hold as a matter of law that a complaint discloses contributory negligence, unless the facts pleaded compel such an inference.

Chicago, etc., R. Co. v. Barnes, 354, 358 (3).

14. *General Issue.—Abandonment of Rights in Lands.*—Where the strict legal title to real estate is not involved the defendant may prove, even under the general issue, that the rights of plaintiff in lands have been abandoned.

Perry v. Carey, 56, 59 (1).

15. *Waiver of Error.—Insufficiency of Complaint.—Failure to Demur.*—Under §348 Burns 1914, Acts 1911 p. 415, §3, providing that, if no objection is made by demurrer or answer, to a defect in the complaint, the objections thereto are waived, failure to demur to a complaint waives the objection that the complaint is insufficient for want of facts.

Van Spanje v. Hostettler, 518, 521 (1).

POLICE POWER—

Railway crossings, regulation, see RAILROADS 19.

POSSESSION—

Action for, see BOUNDARIES.

Factor, in quieting title, see LIMITATION OF ACTIONS 2.

Notice, innocent purchaser, see VENDOR AND PURCHASER.

PRESUMPTIONS—

See APPEAL 76-78; EVIDENCE.

PRICE—

Action for, defenses, pleading, see SALES 1-4.

PRINCIPAL AND AGENT—

See also HUSBAND AND WIFE; NEGLIGENCE 5.

1. *Compromise by Agent.—Ratification.*—The acceptance and retention by the principal of money, property or other benefit as the result of a compromise or settlement by an agent of a claim in favor of or against the principal constitutes a ratification of the compromise or settlement, unless he is without knowledge of the facts. *Public Savings Ins. Co. v. Greenwald*, 609, 626 (14).
2. *Proof.*—The relation of principal and agent may be shown by circumstantial evidence.
Roper v. Cannel City Oil Co., 637, 640 (5).
3. *Ratification.—Evidence.*—In an action on an alleged account stated, evidence held sufficient to warrant the inference that the settlement in controversy made by an agent was ratified by the principal.
Public Savings Ins. Co. v. Greenwald, 609, 625 (13).
4. *Ratification.—Scope.*—A principal who adopts the act of one professing to act for him must adopt it *in toto*, and will not be permitted to claim the benefit arising therefrom, and at the same time repudiate the burden thereof.
Public Savings Ins. Co. v. Greenwald, 609, 617 (6).
5. *Ratification.—Proof by Inference.*—Ratification by the principal of the acts of his agent may be inferred from facts and circumstances proved.
Public Savings Ins. Co. v. Greenwald, 609, 624 (11).
6. *Unauthorized Acts of Agent.—Ratification.—Evidence.*—In an action on an alleged account stated, wherein defendant contended that its agent had no authority to make the settlement in controversy, evidence held to justify the inference that defendant had full knowledge of the settlement soon after it was made.
Public Savings Ins. Co. v. Greenwald, 609, 615, 617 (4).
7. *Unauthorized Acts of Agent.—Ratification.—Effect.*—A principal may ratify the unauthorized acts of his agent, and, when so ratified, such acts become as binding upon the principal as they would have been had such agent been duly authorized in the first instance. *Public Savings Ins. Co., etc. v. Greenwald*, 609, 614 (1).

PRINCIPAL AND SURETY—

See also BILLS AND NOTES 5; INSANE PERSONS 2; INSURANCE 15.

PROMISSORY NOTES—

See BILLS AND NOTES.

PROXIMATE CAUSE—

See APPEAL 75; MASTER AND SERVANT 18, 63.

PUBLIC POLICY—

See INSURANCE 8; RAILROADS 11, 12.

PURPRESTURE—

Definition, see NAVIGABLE WATERS 2.

QUIETING TITLE—

See also APPEAL 13, 109; EASEMENTS 5; EXECUTORS AND ADMINISTRATORS 4; LIMITATION OF ACTIONS 2, 3; REFORMATION OF INSTRUMENTS.

Title.—A cross-complainant seeking to quiet title must recover on the strength of his own title.

Bollenbacher v. Foley, 632, 637 (4).

RAILROADS—

See also CARRIERS; MASTER AND SERVANT 2, 6-8, 10, 11, 14-18; STREET RAILROADS; TRIAL 6-9.

1. *Action for Injuries.—Contributory Negligence.—Evidence.—Sufficiency.—Jury Question.*—In an action for damages sustained by a ten year old child in a crossing accident, the evidence is reviewed and held sufficient to sustain the verdict for the plaintiff as against an objection that the evidence established contributory negligence as a matter of law.

Chicago, etc., R. Co. v. Barnes, 354, 359 (6).

2. *Action for Injuries.—Burden of Proof.—Reception of Evidence.*—Since, in actions for personal injuries caused by negligence, the burden is on the defendant to prove the plaintiff's contributory negligence, the plaintiff had the right, after the defendant had closed its case, to offer evidence on such issue to meet that introduced by the defendant.

Chicago, etc., R. Co. v. Barnes, 354, 359 (5).

3. *Crossing Accidents.—Pleading.*—Where a ten year old child was lawfully upon a highway that crossed the defendant's tracks, the defendant owed her the duty to exercise reasonable care for her safety in operating a train toward her, and, under such circumstances, a general charge of negligence is sufficient as against demurrer.

Chicago, etc., R. Co. v. Barnes, 354, 357 (1).

4. *Crossing Accidents.—Action for Injuries.—Contributory Negligence.—Instruction.*—In an action against a railroad company for injuries sustained by a ten year old child in a crossing accident, an instruction that, if a child ten years old finds herself confronted with danger and confusion, caused by the negligence of the defendant's employes in failing to give proper warning, such child would not be required to act with the prudence and promptness of a person of more mature years, was not objectionable as being without the issues, it being directed to the question of contributory negligence.

Chicago, etc., R. Co. v. Barnes, 354, 365 (10).

5. *Crossing Accidents.—Contributory Negligence.—Children.*—In determining the question of contributory negligence of a child of tender years, who was injured in a crossing accident, effect is given to diverting causes, to partially obstructed crossings and to the fact that the train which struck the child approached the crossing without giving warning or signals.

Chicago, etc., R. Co. v. Barnes, 354, 365 (9).

6. *Crossing Accidents.—Instruction.*—In an action against a railroad company for injuries sustained by a ten year old child in a crossing accident, a complaint alleging that the defendant negligently and carelessly drove its engine toward and over the crossing without ringing the bell or blowing the whistle, and without giving any notice of its approach, was sufficient to warrant instructions relative to the duty of blowing a whistle and ringing a bell required of railroad companies under §5431 Burns 1914, §4020 R. S. 1881. *Chicago, etc., R. Co. v. Barnes*, 354, 368 (12).

RAILROADS—Continued.

7. *Crossing Accidents.—Negligence.—Contributory Negligence.—Presumptions.*—A person injured at a railway crossing by collision is not aided by a presumption of freedom from fault, nor is the railroad company aided by a presumption of contributory negligence. *Chicago, etc., R. Co. v. Van Stone*, 47, 51 (4).
8. *Crossing Accidents.—Action.—Complaint.—Contributory Negligence.*—The rule that a person approaching a railroad crossing is bound to see what he could have seen and to hear what he could have heard is only applicable where it appears that the person charged with the exercise of care is so situated that he could see the train in time to escape injury and there was no excuse for failure to see or hear, and a complaint, in an action for damages to an automobile in a crossing accident, alleging that the driver "slowed down and looked and listened," but could neither see nor hear the train, sufficiently negatives contributory negligence. *Chicago, etc., R. Co. v. Van Stone*, 47, 50, 51 (3).
9. *Crossing Accidents.—Last Clear Chance.*—In a personal injury action against a railroad company for injuries sustained by the plaintiff in a crossing accident, where the facts were such that the doctrine of last clear chance was applicable, the negligence of the plaintiff in stepping on the track became immaterial. *Cleveland, etc., R. Co. v. Sammons*, 657, 664 (5).
10. *Crossing Accidents.—Presumptions.*—A person crossing a railroad track at a street crossing may, in the absence of notice to the contrary, rely on the presumption that the railroad company will obey the city ordinances. *Cleveland, etc., R. Co. v. Sammons*, 657, 664 (3).
11. *Crossing Other Railroads.—Agreement.—Validity.—Public Policy.—Consideration.—Statutes.*—A contract under the terms of which defendant railway granted to plaintiff street railway a right to forever maintain a single track across the tracks and right of way of defendant in consideration that plaintiff maintain the necessary crossings at its own expense, is invalid as against public policy, and in violation of §§5676, 5677 Burns 1914, Acts 1901 p. 461, §§2, 3, as to the expense of the establishment of such crossing and their subsequent maintenance; and such contract was unenforceable as not being supported by any sufficient consideration, since plaintiff already had the right, regardless of the contract, of crossing the tracks of defendant railroad. *Vandalia R. Co. v. Fort Wayne, etc., Traction Co.*, 120, 130, 131 (4).
12. *Crossing Other Railroads.—Contracts.—Public Policy.—Statutes.*—Sections 5676, 5677 Burns 1914, Acts 1901 p. 461, §§2, 3, as to the expense of the establishment of the crossing of a street railroad over the tracks of other railroads, and the subsequent maintenance of such crossings, in effect declare the public policy of the state to be against leaving open to contract, speculation or controversy, the question of who shall make necessary repairs to such crossings, or charged with the duty of maintaining and keeping in repair its own tracks. *Vandalia R. Co. v. Fort Wayne, etc., Traction Co.* 120, 129 (2).
13. *—Killing Stock.—Action.—Circumstantial Evidence.*—In an action against a railroad company for killing a horse, under allegations that the horse escaped to the defendant's right of way and was killed by a train because of the defendant's failure to maintain a proper fence, as required by §§5436-5442 Burns 1914,

RAILROADS—Continued.

§§4025-4031 R. S. 1881, the fact that a train struck or came in contact with the horse could be proved by circumstantial evidence.

Chicago, etc., R. Co. v. Keefer, 16, 17 (1).

14. *Killing Stock.—Action.—Sufficiency of Evidence.*—In an action against a railroad company for killing a horse, alleged to be due to the defendant's failure to maintain a proper fence, as required under §§5438-5442 Burns 1914, §§4025-4031 R. S. 1881, evidence that the horse escaped through the fence, that tracks indicated that it had run along the railroad track to a bridge and had started to cross the bridge, that its body was found in the bed of the stream below, that its neck was broken and its breast bruised, was insufficient to sustain a verdict for the plaintiff, there being no evidence that any trains passed over the railroad from the time the horse escaped until its dead body was found in the stream.

Chicago, etc., R. Co. v. Keefer, 16, 18 (2).

15. *Negligence.—Instructions.—Inference from Evidence.*—The court may say in a proper case, as a matter of law, that ordinary care requires those operating a train to keep a lookout, and whether the court in a particular case is warranted in so instructing the jury depends on whether the facts are such as to authorize or justify but one inference, and that inference one which leads all reasonable men to say that ordinary care required such lookout.

Grand Trunk, etc., R. Co. v. Thrift Trust Co., 198, 219 (11).

16. *Negligence.—Action.—Defenses.—Pleading Receivership.*—In an action against a railroad company for damages to property in a crossing accident, alleged to be due to the negligent operation of the road, it is unnecessary to raise the defense that the road was being operated by receivers by special answer.

Chicago, etc., R. Co. v. Van Stone, 47, 55 (7).

17. *Negligence.—Action.—Defenses.—Operation of Road by Receiver.*—In an action for damages to property in a railroad crossing collision, alleged to be due to the negligent operation of its road by the railroad company, a mere showing that the road was being operated by receivers at the time of the accident is a sufficient defense, and it is unnecessary for defendant to prove that the receivers had qualified.

Chicago, etc., R. Co. v. Van Stone, 47, 54 (6).

18. *Negligence.—Actions.—Defenses.—Operation by Receiver.*—Where an action is brought against a railroad company for damages based on negligence in operating its road, it is a sufficient defense to show that the road at such time was in the possession and control of a receiver who had exclusive charge of the employment and management of the agents and employees operating the railroad.

Chicago, etc., R. Co. v. Van Stone, 47, 52 (5).

19. *Regulation.—Crossings.—Police Power.*—The public has a vital interest in the proper maintenance of street railway crossings over railroads, and statutory regulation of the establishment and the maintenance of such crossings fall within the police power of the state.

Vandalla R. Co. v. Fort Wayne, etc., Traction Co., 120, 128 (1).

20. *Damage to Property.—Fire.—Contributory Negligence.*—The owner of property destroyed by fire is not guilty of contributory negligence for failing to make any attempt to save his property, where any effort he could have made would have been ineffectual.

Baltimore, etc., R. Co. v. Peck, 269, 276 (8).

RAILROADS—Continued.

21. *Damage to Property.—Fire.—Liability.—Degree of Care Required.*—In an action against a railroad company for damage to land by fire which escaped from defendant's right of way, defendant was only called upon to prove that it used that degree of care that an ordinarily prudent man would have used under the circumstances. *Baltimore, etc., R. Co. v. Peck*, 269, 275 (6).
22. *Damage to Property.—Fire.—Contributory Negligence.—Knowledge of Danger.*—The fact that the owner of a farm did not live thereon and that it was not occupied by a tenant does not establish that the owner was without knowledge that his property was in danger of being injured by fire, but may be considered by the jury on the issue of contributory negligence. *Baltimore, etc., R. Co. v. Peck*, 269, 274 (5).
23. *Damage to Property.—Fire.—Liability.—Contributory Negligence.—Knowledge of Danger.*—Where a person knows that his property is in danger of destruction by fire caused by the negligence of another and fails to use every reasonable effort to protect it from impending danger, he is guilty of contributory negligence. *Baltimore, etc., R. Co. v. Peck*, 269, 274 (4).
24. *Damage to Property.—Fire.—Liability.—Negligence.*—The owner of land near a railroad right of way assumes the risk of accidental loss by fire not occasioned through the railroad's negligence or wilfulness, but does not assume any risk occasioned by negligence of the railroad. *Baltimore, etc., R. Co. v. Peck*, 269, 274 (3).
25. *Damage to Property.—Fire.—Liability.—Anticipating Negligence.*—The owner of land near a railroad has the right to assume that it will perform all legal duties resting upon it, and such owner is not bound to anticipate that the railroad will be derelict in its duty to prevent the spread of a fire originating on its right of way. *Baltimore, etc., R. Co. v. Peck*, 269, 274 (2).
26. *Damage to Property.—Fire.—Proof.—Circumstantial Evidence.*—The fact that a fire which burned over plaintiff's land originated on defendant's right of way need not be established by direct testimony, but may be proved by circumstantial evidence. *Baltimore, etc., R. Co. v. Peck*, 269, 272 (1).
27. *Damage to Property.—Fire.—Question for Jury.—Contributory Negligence.*—In an action against a railroad for damage to land by fire, where it appeared from the evidence that because of the peaty condition of the soil, the drought, and the growth of grass and weeds, which were withered and dry, the owners of lands between the railroad's right of way, where the fire originated, were unable to control the spread of the fire onto and across their lands to plaintiff's farm, the question whether plaintiff could have saved his property by the exercise of ordinary care was for the jury. *Baltimore, etc., R. Co. v. Peck*, 269, 275 (7).
28. *Damage to Property.—Fire.—Liability.—Harmless Error.—Instructions.*—In an action against a railroad company for damage by fire originating on its right of way, an instruction that a railroad company may be free from negligence in allowing combustible material to accumulate upon its right of way and permitting it to be burned thereon, and that whether it was negligent in allowing the fire to escape from its right of way, although subject to the criticism that, when standing alone, the jury might infer that proof establishing the accumulation of combustible material on the right of way, or the burning of it thereon, would

RAILROADS—Continued.

make out a cause of action against defendant, the error in giving such instruction was not prejudicial to defendant in view of subsequent instructions that, if the railroad permitted combustible material to accumulate and be burned on the right of way, it would have to use ordinary care to prevent the fire from escaping and injuring other lands; that, if the evidence failed to show that the fire escaped through the negligence of the railroad, it was not liable; that there was no presumption that any of the material allegations of the complaint were true and that there could be no recovery unless the material allegations of the complaint were established by the evidence; that, if plaintiff failed to prove that whatever fire there was on the right of way was negligently permitted to escape, there could be no recovery.

Baltimore, etc., R. Co. v. Peck, 269, 276 (9).

RATIFICATION—

Of compromise agreement by agent, effect on principal, see **PRINCIPAL AND AGENT**.

RECEIVERS—

Proof of receivership, as defense in action for injuries, see **RAILROADS** 16-18.

Permission to Sue.—Counterclaim.—Although it is the general rule that a receiver can neither sue nor be sued without leave of court, yet a defendant in an action brought by a receiver may file an appropriate counterclaim without first obtaining permission to sue the receiver, in view of §352 *et seq.* Burns 1914, §347 R. S. 1881, relating to set-off and counterclaim.

Curtis, Rec., v. Chicago, etc., R. Co., 370, 376 (2).

RECORDS—

On appeal, preparation and contents, see **APPEAL** 18-30.

Public, authentication, admissibility, see **EVIDENCE** 10.

REFORMATION OF INSTRUMENTS—

Pleading.—Sufficiency.—In a suit to quiet title, a cross-complaint seeking the reformation of deeds, and to quiet title to all the land of which the cross-complainant had possession under the deeds, was sufficient where it alleged a previous definite contract between the parties to the deed for a conveyance of the land in dispute, the intent to include such land in the deed, the ignorance of the parties of the mistake, and the payment of a valuable consideration.

Bollenbacher v. Foley, 632, 635 (1).

REMITTITUR—

Cure of error, see **APPEAL** 134.

RESCISSION—

See **SALES** 3, 17.

REVIEW—

See **APPEAL**.

REVOCATION—

Burden of proof, see **EASEMENTS** 5; **LICENSES**.

RISKS—

Assumption, see MASTER AND SERVANT 7-11.

ROADS—

See HIGHWAYS.

RULES OF COURT—

Preparation of briefs, see APPEAL 35-59.

SALES—

See also FRAUD 5; INFANTS 5-7; MORTGAGES 4.

1. *Action for Price—Defenses.—Pleading.—Variance.*—Where, in an action against the buyer for the purchase price of property, he filed an answer claiming a rescission for fraud, he should be confined to that theory, and is not entitled to have such answer in bar treated as a counterclaim under which he could recover the difference between the value of the property received and its value if it had been as represented.
Bright Nat. Bank v. Hanson, 61, 77 (10).
2. *Action on Notes for Price.—Defenses.*—A defrauded buyer who has given his notes for the purchase price has the same defenses in an action by the seller on the notes as in a direct action for the purchase price.
Bright Nat. Bank v. Hanson, 61, 77 (9).
3. *Action for Price.—Defenses.—Rescission.—Damages.*—Where one has been induced to purchase property by the seller's fraudulent representations, he may rescind the contract and offer to return anything of value received under it or may stand upon his contract and recover as damages the difference between the actual value of the property at the time it was received and its value if it had been as represented.
Bright Nat. Bank v. Hanson, 61, 77 (8).
4. *Breach of Contract.—Action.—Special Damages.—Pleading.*—In an action for breach of a sales contract, if special damages are relied on, the facts on which they are based must be specifically pleaded, as only those damages which would usually flow from the breach of such a contract are provable under a general averment of damages sustained.
Taylor v. Capp, 593, 603 (10).
5. *Breach of Contract.—Action by Seller.—Complaint.—Sufficiency.*—In an action for breach of contract of sale, paragraph of complaint held sufficient to state a cause of action to recover of the vendee the difference between the contract price and the price obtained on resale.
Taylor v. Capp, 593, 603 (11).
6. *Breach of Contract.—Action by Seller.—Complaint.—Sufficiency.*—In a seller's action for breach of the contract of sale of personal property, a complaint seeking recovery of the difference between the contract price and the price obtained on resale is fatally defective where it fails to allege that the seller retained possession of the goods for the buyers after the breach of the contract and that he sold the goods as their agent after due notice to them of his intention to sell.
Taylor v. Capp, 593, 604 (13).
7. *Buyer's Breach of Contract.—Action.—Damages.—Proof.*—Where, after a breach of contract for the sale of personal property, the seller retains the property and sues to recover the difference between the contract price and the market price at the time and place of delivery, if there is no such market value the seller's damages may be otherwise established, and proof of

SALES—Continued.

sales of similar property within a reasonable time, and at places reasonably convenient and accessible, may be considered in determining such value, but the mere absence of an immediate demand for the property sold, at the time and place of delivery, would not establish the want of a market value.

Taylor v. Capp, 593, 602 (8).

8. *Buyer's Breach of Contract.—Action.—Complaint.*—Where the seller, after a breach of contract of sale of personal property, sues for the difference between the contract price and the price obtained on resale, averments in the complaint must show that he retained possession for the vendee and that the sale of the property by the seller was as agent for the buyer after proper notice of intention to sell.

Taylor v. Capp, 593, 600 (5).

9. *Breach of Contract by Buyer.—Action.—Complaint.*—Where, after a buyer's breach of the sale contract, the seller keeps the property as his own and sues to recover the difference between the contract price and the market price at the time and place of delivery, the complaint is sufficient though not alleging the market value at the time and place of delivery, where it contains a general averment that plaintiff was damaged in a specific amount.

Taylor v. Capp, 593, 601, 603 (7).

10. *Buyer's Breach of Contract.—Retention of Property by Seller.—Damages.*—Where the seller, on the buyer's breach of the contract of sale, retains the property as his own, it is immaterial whether he keeps or sells it, since the damages in such a case are those actually sustained, which ordinarily is the difference between the contract price and the market value of the property at the time and place of delivery.

Taylor v. Capp, 593, 601 (6).

11. *Buyer's Breach of Contract.—Damages.—Proof.*—The mere fact that a quarantine prevents the offering of live stock on the market does not establish the want of market value.

Taylor v. Capp, 593, 603 (9).

12. *Buyer's Breach of Contract.—Action.—Complaint.*—On the buyer's breach of contract for the sale of personalty, whether the seller retains the property and sues for the entire purchase price or sells the property as the buyer's agent and sues to recover the difference between the contract price and the price obtained on resale, the complaint must show that the vendor retained possession of the property for the vendee.

Taylor v. Capp, 593, 600 (4).

13. *Buyer's Breach of Contract.—Seller's Remedies.—Condition Precedent.*—The seller's right, on the buyer's breach of a contract of sale of personal property, to retain the property as and for the buyer and sue for the purchase price, or sell the property as agent of the vendee and recover the difference between the contract price and the price obtained on resale, is dependent on whether the contract has been fully executed by him so far as execution is possible.

Taylor v. Capp, 593, 600 (3).

14. *Buyer's Breach of Contract.—Seller's Remedies.*—Where there has been a breach of contract for the sale of personal property by the buyer, the seller may retain or store the property for the vendee and recover the entire purchase price, he may sell the property for and as the vendee's agent and recover the difference between the contract price and the resale price, or he may keep the property as his own and recover the difference between the

SALES—Continued.

contract price and the market price at the time and place of delivery. *Taylor v. Capp*, 593, 599 (2).

15. *Implied Warranty.—Merchantability.*—In the sale of perishable goods, such as apples, there is no implied warranty that they will continue sound or merchantable for a definite period or for any period after delivery.

Rinelli v. Rubino, 314, 317 (2).

16. *Merchantability.*—The general rule is that where goods are sold by description and the buyer has had no opportunity for inspection, the goods must not only, in fact, answer the description, but must also be salable or merchantable under such description.

Rinelli v. Rubino, 314, 317 (1).

17. *Rescission by Buyer.—Return of Consideration.—When Necessary.*—A buyer defending an action on the purchase notes on the ground of fraud need not allege and prove an offer to return the goods where they were worthless.

Bright Nat. Bank v. Hanson, 61, 74 (6).

18. *Sales Induced by Fraud.—Remedies of Purchaser.—Avoidance.*—A sale of property induced by fraud is not void, but only voidable at the election of the purchaser, the title, in such a sale, passing to the purchaser, and so remaining, unless he rescinds.

Brumbaugh v. Mellinger, 410, 414 (4).

19. *Sale Induced by Fraud.—Rescission.—Restoration.*—If a defrauded buyer elects to rescind the contract of sale, he must make a complete restoration of everything of value received under the contract.

Brumbaugh v. Mellinger, 410, 415 (5).

SEPARATE ESTATE—

See HUSBAND AND WIFE 12, 13.

SERVANTS—

See MASTER AND SERVANT.

SERVITUDES—

See EASEMENTS 4; ESTOPPEL 1; STREET RAILROADS.

SET-OFF AND COUNTERCLAIM—

Counterclaim by receiver, permission, see RECEIVERS.

Counterclaim.—Pleading in Action on Contract.—In an action against a railway company for damages caused by the forcible removal from defendant's right of way of plaintiff railway company's tracks, which had been constructed on defendant's property pursuant to a contract, defendant could counterclaim for damages resulting from the failure of plaintiff to comply with the terms of the agreement.

Curtis, Rec., v. Chicago, etc., R. Co., 370, 375 (1).

SIGNALS—

Statutory, crossings, see APPEAL 106.

STATES—

School Fund Mortgage.—Party in Interest.—The state is the real party in interest under a school fund mortgage.

Moore, etc., Lumber Co. v. Scheld, 694, 697 (1).

STATUS QUO—

See EASEMENTS 6; INFANTS 6.

STATUTES—

Cited and construed, see also p. xxii.

Violation, injuries to servant, effect, see MASTER AND SERVANT 3, 11.

1. *Construction.—Purpose and Scope.*—In construing an act its general purpose will be considered.

John A. Schumaker Co. v. Kendrew, 466, 472 (2).

2. *Construction.—Construing as a Whole.*—It is a general rule of statutory construction that an act of the legislature must be construed as a whole. *Brayton v. City of Rushville*, 238, 243 (6).

3. *Construction.—Intent.*—In construing a statute according to the intent of the legislature, the court must make such application of the provisions thereof as will best promote its objects and in so doing the court is not always bound by the literal meaning of the words employed. *Ramsey v. Yount*, 378, 383 (5).

STOCK—

Corporation, sale, fraud, action on purchase note, see CORPORATIONS.

STREET RAILROADS—

Use of Streets.—Easement.—Scope.—A street or interurban railroad laid upon a public street by permission of the proper municipal authorities does not constitute an additional burden or servitude, but is within the uses legally contemplated by the grant of the easement.

Vandalla R. Co. v. Fort Wayne, etc., Traction Co., 120, 129 (3).

STREETS—

Improvements, see MUNICIPAL CORPORATIONS 6, 10-17.

SUBCONTRACTORS—

Agreement as to relation, effect under Workmen's Compensation Act, see MASTER AND SERVANT 19.

SUICIDE—

"By his own act," construction, see INSURANCE 7.

SUPPLEMENTAL PROCEEDINGS—

See EXECUTION.

SUPPORT—

Contract with decedent, breach, recovery, see EXECUTORS AND ADMINISTRATORS 1.

TENDER—

Waiver.—A formal technical tender is not waived by a mere assertion of a lien or claim in excess of the amount due, since a tender of the proper sum might be accepted.

Federal Life Ins. Co. v. Weedon, Admr., 529, 541 (8).

TEXT-BOOKS—

Cited, see p. xxv.

THEORY—

See **PLEADING 1.**

TITLE—

Conveyance, necessity of delivery, see **DEEDS 8.**

TORTS—

Action, scope of recovery, see **DAMAGES.**

Of administrator, liability of estate, see **EXECUTORS AND ADMINISTRATORS 2.**

TOWNS—

See **MUNICIPAL CORPORATIONS.**

TRANSCRIPT—

See **APPEAL 15, 19, 43.**

TRANSFER—

Rule of Supreme Court opinion, effect on Appellate Court, see **COURTS.**

TRESPASS—

Irreparable injury, right to enjoin, see **INJUNCTION.**

TRIAL—

See also **COURTS ; NEW TRIAL.**

Review of rulings at trial, see **APPEAL.**

Findings and conclusions, not required in proceedings supplemental, see **EXECUTION 6.**

Questions for jury, see also **BOUNDARIES 2 ; DAMAGES 3 ; MASTER AND SERVANT 5, 13, 15, 18 ; RAILROADS 1, 27.**

Review of instructions, see also **APPEAL 9, 20-29, 37, 39, 67, 69, 74, 95, 96, 101-107, 111-113, 116, 117, 131, 134.**

1. *Discretion of Court.—Opening Statement.—Reading from Complaint.*—The extent of the opening statement of a case to the jury is left largely to the discretion of the trial court and to permit the reading of the entire complaint would not ordinarily be an abuse of such discretion, although where the complaint contains matters of surplusage which might tend to prejudice the jury, the court may, on proper objection, exclude the reading of such portion, but to be available an objection thereto should be directed to the averments claimed to be prejudicial and not to the whole complaint. *Vandalia Coal Co. v. Butler*, 245, 254 (4).

2. *Evidence.—Province of Jury.*—The jury had the right to consider and weigh all the evidence, including such fair and reasonable inferences as might be drawn therefrom.

Roper v. Cannel City Oil Co., 637, 643 (8).

3. *Evidence.—Offer to Prove.—Contents of Instruments.*—Offered evidence involving the witness's interpretation of written instruments not before the court was incompetent; hence, error may not be predicated on the action of the court in refusing to permit the witness to answer.

Roper v. Cannel City Oil Co., 637, 645 (13).

4. *Instructions.—Failure to Request.*—Where plaintiff failed to request any further instruction on a phase of the case covered by

TRIAL—Continued.

an instruction which was good as far as it went, he cannot complain of the instruction given.

Gibson v. City of Indianapolis, 89, 92 (4).

5. *Reception of Evidence.—Discretion of Court.*—Though the course of procedure as to the introduction of evidence should as a rule conform to §558, cl. 3, Burns 1914, §533 R. S. 1881, it is within the discretion of the court to permit a party to introduce further evidence after he or his adversary has closed his case in chief, and such action will be reviewed on appeal only where there is an abuse of the discretion.

Chicago, etc., R. Co. v. Barnes, 354, 359 (4).

6. *Special Interrogatories.—Motion for Judgment.—Evidence.—Presumptions.*—Where, in an action against a railroad company for injuries sustained in a crossing accident, the general verdict was for the plaintiff, and the jury by answers to special interrogatories found that there was a light on the tender approaching the plaintiff and that the plaintiff backed into the engine in getting out of the way of another train, and the defendant moved for judgment on the special answers, evidence having been admissible to show that the "light" was not lighted and that there was much confusion at the time and place of the accident, the presumption on appeal, in support of the general verdict, is that such evidence was introduced.

Cleveland, etc., R. Co. v. Sammons, 657, 663 (2).

7. *Special Interrogatories.—Motion for Judgment.—Evidence.—Admissibility.*—In a personal injury action against a railroad company, where the complaint alleged that the defendant negligently ran its engine over the plaintiff, and the jury by answers to special interrogatories found that there was an unobstructed view of the crossing for a distance of sixty feet, that the engine could have been stopped within fifteen feet, and that the plaintiff stood on the track probably a minute, the court on appeal will presume, in support of the general verdict, that evidence was introduced in support of the doctrine of last clear chance, which applied under the facts found by the special answers.

Cleveland, etc., R. Co. v. Sammons, 657, 664 (4).

8. *Verdict.—Special Interrogatories.*—Answers to interrogatories will not overthrow the general verdict unless there is such irreconcilable conflict that both may not stand, every presumption being in favor of the general verdict.

Cleveland, etc., R. Co. v. Sammons, 657, 663 (1).

9. *Verdict.—Directing.*—It was proper to direct a verdict where there was no evidence on which the jury could have properly returned a verdict other than that rendered, and the trial court would have been compelled to set aside a different verdict as not sustained by the evidence.

Williams v. Pittsburgh, etc., R. Co., 93, 101 (11).

10. *Verdict.—Directing.*—A request for an instruction directing a verdict for defendants was properly refused where there was some evidence to sustain every material averment of the complaint.

Van Spanje v. Hostettler, 518, 528 (9).

TRUSTS—

Breach, action, see **PARTNERSHIP**.

Establishment, quieting title, see **LIMITATION OF ACTIONS**.

TRUSTS—Continued.

1. *Disavowal.—Proof.*—The fact that a trust has been openly disavowed and repudiated by the trustee, with knowledge of the *cestui que trust*, may be proved by circumstances. *Buckel v. Auer*, 320, 327 (10).
2. *Constructive Trusts.*—The court cannot construct a trust where the misconduct amounts merely to a breach of contract to convey, where there was no fraud or undue influence connected with the transaction in its inception. *Moore v. McClain*, 102, 108 (1).

UNDUE INFLUENCE—

See GIFTS.

USER—

Permissive use of lands, rights acquired, see ADVERSE POSSESSION.

VENDOR AND PURCHASER—

See also SALES.

Notice.—Possession.—Where a cross-complainant took possession of land under a deed containing an incorrect description, and made permanent improvements thereon, including a permanent fence on the boundary in dispute, the plaintiff, who obtained the deed under which she claimed long after such improvements were made and with full knowledge of the facts, was not an innocent purchaser. *Bollenbacher v. Foley*, 632, 636 (3).

VARIANCE—

See APPEAL 114; BOUNDARIES 3; SALES 1.

VERDICT—

See TRIAL.

Review, see APPEAL 80-94, 95, 96.

General and special, see MASTER AND SERVANT 1.

WAIVER—

Of error, see APPEAL 118-129.

Time of payment of assessments, see INSURANCE 2.

Claim of more than amount due, effect as to tender, see TENDER.

WARRANTY—

Implied, merchantability, see SALES 15.

WATERS AND WATERCOURSES—

See NAVIGABLE WATERS.

WIDOWS—

Rights, protection against conveyances, statute, construction, see HUSBAND AND WIFE 9, 11.

WIFE—

See HUSBAND AND WIFE.

WILLS—

See also **EXECUTORS AND ADMINISTRATORS.**

Ratification.—Acceptance of Benefits.—The acceptance of benefits under a will amounts to a ratification of the will in all its parts, and the person so accepting must bear the burdens thereby imposed. *Buckel v. Auer*, 320, 329 (13).

WITNESSES—

See also **EVIDENCE; TRIAL 3.**

1. **Conclusions.**—The question, "Tell the court and jury all the facts and circumstances of the transaction in which the note in suit was given," was objectionable as calling for the conclusion of the witness. *Roper v. Cannel City Oil Co.*, 637, 644 (11).
2. **Cross-Examination.—Scope.—Discretion of Court.**—The extent to which a cross-examination of a witness may be carried rests within the sound discretion of the trial court and a cause will only be reversed for an abuse of such discretion. *Vandalia Coal Co. v. Butler*, 245, 258 (10).

WORDS AND PHRASES—

"Accident," definition, see **MASTER AND SERVANT 20, 21.**

"By his own act," construction of policy, see **INSURANCE 7.**

"Decision," meaning, see **APPEAL 4.**

"Final judgment," definition, see **APPEAL 2-6.**

Personal injury, meaning as used in Workmen's Compensation Act, see **MASTER AND SERVANT 55.**

"Purpresture," meaning, see **NAVIGABLE WATERS 2.**

WORKMEN'S COMPENSATION—

Proceedings before Industrial Board, rights and liabilities under act, etc., see **MASTER AND SERVANT 19-65.**

2240
5/18/21

